No. 3102

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL CARBON COMPANY, a corporation,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a corporation, Claimant of the Steamship "EUREKA," her engines, boilers, tackle, apparel, furniture, etc.,

Appellee.

BRIEF OF APPELLEE.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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STATEMENT OF FACTS.

In the months of September, October and November, 1915, the Steamship "Eureka" was chartered to carry cargo between the ports of New York and San Francisco, and intermediate ports. The charter of the steamship prescribed the Panama Canal route.

During the above period of time, the Steamship Eureka was owned by the Pacific Coast Steamship Company. The Pacific Coast Steamship Company chartered the vessel to the Crosset Western Lumber Company. The Crossett Western Lumber Company sub-chartered the vessel to the H. M. Williams Company. The H. M. Williams Company in turn sub-

chartered the vessel to the Oregon-California Shipping Company.

The vessel is now owned by the Alaska Steamship Company.

On the 8th, the 14th and the 16th days of September, 1915, the National Carbon Company placed on board the Steamship "Eureka" certain shipments of dry cells.

The shipments of September 8th and 14th were loaded at the port of New York, and were consigned to the National Carbon Company at San Francisco, California. The shipment of September 16th was loaded at the port of Philadelphia and consigned to F. H. Murray at Los Angeles, California.

Mr. Murray was the local agent of the National Carbon Company at Los Angeles.

The steamship started on her voyage, and reached the Atlantic entrance to the Panama Canal on Septemper 28th, 1915. Immediately after her arrival, the Captain ascertained that slides had taken place in the Canal, which slides were of sufficient magnitude to temporarily impede the passage of vessels through the Canal.

The National Carbon Company, together with other shippers, had negotiated for space on the vessel through the firm of L. Rubelli's Sons, who were brokers. For this reason, the Captain immediately cabled to L. Rubelli's Sons, advising them of the con-

ditions which confronted him upon his arrival at the Atlantic entrance to the Panama Canal, in order that they might in turn advise the various shippers regarding the impediments to the progress of the voyage.

As soon as it was ascertained that the "Eureka" would be delayed at the Atlantic entrance to the Panama Canal, the Master made daily efforts to ascertain the probable length of time which would elapse before the reopening of the Canal. The officers of the United States Government gave out advices from day to day which led the Master to believe that reasonable progress was being made in the removal of the slides, and that the Canal might be reopened within a comparatively short time.

These very unusual conditions demanded of the ship's Captain the exercise of that extraordinary discretion which is, by the maritime law, vested in the Master of a ship.

The Panama Canal had been opened only a short period of time. It was a new and unknown waterway. There existed no past experience concerning its navigation. Water highways, whether inland or otherwise, have a nautical history, which is founded on the experience of navigators from time immemorial. This waterway had no history.

When mariners are sailing over courses which have a history, they are able to base their judgment and the required exercise of discretion which flows therefrom, upon the experiences of the past. They

are able to determine the probable length of time that temporary impediments may last, upon the basis of their previous occurrences.

No slides have ever before occurred in the Panama Canal, because there had been no Panama Canal known to the world's history. There was, therefore, no previous experience upon the basis of which the Master of the ship could determine the probable length of time which would be required for removing the slides. For all the Master knew, the slides might be removed within a very few days and the obstacles to the progress of his voyage thereby obviated.

The fact remained, however, that he could not proceed on his course. He had contracted to carry the cargo by the way of the Panama Canal route.

The anticipated advantages of this route were the very basis of the charter under which the steamship was operating. Shippers contemplated that the reduction in the amount of time necessary to ship goods by water from the Atlantic to the Pacific Coast by the way of the Panama Canal would be of great advantage in shipping perishable cargo. The long voyage by the way of the Straits of Magellan was of great disadvantage in shipping perishable cargo.

The Captain, as a master mariner, was supposed to have full knowledge of all these facts, and was, therefore, compelled to take them into consideration before exercising his discretion.

As Master of the ship, he owed a duty not only to the National Carbon Company, but to all of the other shippers who had cargo upon the boat. He owned a duty to the owner of the boat. He owed a duty to the charterer of the boat. He owed a duty to everyone having an interest in this particular voyage.

He was, therefore, compelled to form a judgment and exercise a discretion which would be for the benefit of all these conflicting interests.

He could not very well reverse his course and return to the ports of shipment, because if he had done so, the slides might have been removed and the Canal might have been reopened while he was returning. If such an event had happened while he was returning, then everyone having an interest in the voyage could well have complained that the Captain had not exercised a sound judgment, and had abused his discretion.

He could not have turned to any neighboring port and transhipped the cargo, because there was no such neighboring port, and if there had been such a port to which he could have turned, he would still have been confronted with the possibility that the Canal might reopen, and in such an event he would have been held guilty of exercising a poor judgment, and charged with the abuse of discretion.

He could not have continued his voyage by the way of the Straits of Magellan, because the avoid-

ance of this course was the very purpose of the shipment by the way of the Panama Canal route.

It further developed that the "Eureka" was an oil burner, and sufficient fuel could not be obtained to take her by the way of the Straits of Magellan.

In addition to all this, the original charter prescribed that the "Eureka" was to sail "via the Panama Canal, only," and, therefore, such an attempt would have been not only a violation of the provisions of the bill of lading, but likewise a violation of the original charter. The Captain, therefore, deemed it advisable to wait for a reasonable period of time to see if more definite information regarding the reopening of the Panama Canal could not be obtained from the United States Government.

This perplexing state of affairs continued until October 15th, 1915, at which time the Master again advised L. Rubelli's Sons that it was "impossible to obtain definite information" as to the reopening of the Canal, but that in all probability the same would not be reopened before January 1st, 1916.

The bills of lading, evidencing the shipments of the National Carbon Company on the Steamship "Eureka" contained provisions to the effect that if the steamer should be prevented, by any cause, from proceeding in the ordinary course of her voyage, the goods were to be transhipped to their destination at the expense of the shipper, and that the carrier should not be liable for loss or damage occasioned by causes beyond its control.

As soon as it was ascertained that the probability of the reopening the Canal was somewhat remote, the Master and the owner made every possible effort to tranship the goods across the Isthmus of Panama and forward them by water from the Pacific entrance to the Panama Canal to the points of destination on the Pacific Coast.

Several obstacles arose in the path of the efforts which were made to accomplish a transhipment across the Isthmus of Panama.

The United States Government forbade the discharge of any cargo at Colon unless the ship so discharging would guarantee to immediately tranship, across the Isthmus, the cargo discharged, and to immediately tranship the same from the Pacific entrance of the Canal to the points of destination. Railway accommodations across the Isthmus could not be obtained. Boats were scarce. It was found impossible to obtain any ships or space upon the Pacific seaboard. The unsettled conditions in Mexico made it impossible to obtain railway accommodations from the Isthmus of Tehuantepec up the Pacific Coast. Efforts were made to procure a transhipment of the goods over several different lines of carriers, and all such efforts failed.

Beginning on the 15th day of October, 1915, when the Master was advised that no definite information could be obtained as to the probable date of the reopening of the Canal, the firm of L. Rubelli's Sons, the Oregon-California Shipping Company, the charterers, and the Master, made a thorough investiga-

tion of all practical methods of dispatching the boat or cargo to the points of destination. As already stated, they made efforts to tranship across the Isthmus of Panama and up the Pacific Coast by other carriers.

They interviewed, amongst others, the Duluth Steamship Company, Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic and Pacific Transportation Company, the Luckenbach Company, the Panama Pacific Line of New York, the owners of the Edison Line at Boston, the Alaska Steamship Company and Olson & Mahoney. Even as late as November 3rd, 1915, efforts were still being made to tranship the cargo by way of the Panama Railroad, and the National Carbon Company was notified of such efforts.

The National Carbon Company introduced upon the trial of this case a telegram addressed to it under date of November 4th, 1915, which read as follows:

"Portland, Ore., 11-4-15.

National Carbon Co.

Using all means possible make disposition Eureka cargo with least possible delay nothing definite yet but hope conclude arrangements any minute when will wire you.

Chas. Kurz."

(Libellant's Exhipit 26.)

Mr. Kurz was the General Manager of L. Rubelli's Sons.

The claimant of the Steamship "Eureka" introduced upon the trial of this case a telegram reading as follows:

"Portland, Oregon, October 16, 1915.

L. Rubbeli & Sons,
Philadelphia.

We are using every means to transfer cargo our views that if we secure boat on Pacific in short time could make delivery before ships through Magellan idea arrangement edison light to exchange cargo situation just as you see it please wire what you are able to do with any one having boat on Pacific what is storage rate at canal.

Oregon California Shipping Co."

(Claimant's Exhibit C.)

These uncontradicted telegrams establish that every possible effort was being made from October 16th, 1915, to November 4th, 1915, to arrange for some method of transhipping the cargo, in accordance with the provisions of the bills of lading, and thus relieve the ship and the shippers from the predicament which had been precipitated by the unforeseen slides in the Panama Canal.

During all of this period of time, the firm of L. Rubelli's Sons and the owner of the steamship were in constant communication with the Master, and

were advising him of the efforts which were being made to accomplish a transhipment of the cargo.

Relying upon these advices and likewise upon the information which he was receiving from the United States Government as to the efforts being made to reopen the Canal, the Master remained at the Atlantic entrance to the Canal until the 4th day of November, 1915.

On November 4th, 1915, the Master, after reviewing the entire situation and concluding that the Canal would not be reopened within a reasonable time thereafter, and further concluding that all efforts at transhipment were futile, determined, in the exercise of his discretion, to sail to the port of New Orleans and tranship the cargo at the expense of the shippers.

This was done. The cargo of the Steamship "Eureka," including that portion thereof belonging to the National Carbon Company, was taken to New Orleans and transhipped by rail from New Orleans to the places of consignment.

On the 8th day of July, 1916, the National Carbon Company filed in the District Court of the United States for the Western District of Washington, Southern Division, a libel against the Steamship "Eureka." This libel set forth the history of the shipments placed on board the Steamship "Eureka," as above outlined, and alleged that the cargo belonging to the libellant was damaged, while on board the

Steamship "Eureka," by reason of its detention at the Atlantic entrance to the Panama Canal.

The libel further alleged that on October 1st, 1915, the libellant first heard of the closing of the Panama Canal, and immediately notified the agents of the steamship concerning the perishable character of the cargo, and that a demand was at the same time made upon the agents of the steamship for a delivery of libellant's cargo at the port of Colon. It was further alleged that those in charge of the Steamship "Eureka" failed and refused to deliver said goods to the libellant. It was likewise alleged that such demand was repeatedly made upon the agents of the Steamship "Eureka" for a long period of time, accompanied by an admonition that a refusal to conform to the demand would result in a total loss of the cargo, because of its perishable nature, and that such demand was nevertheless refused.

The libel further alleged that after the lapse of several weeks following the making of such demand, during which period of time the libellant was in constant communication with those in charge of the Steamship "Eureka," the cargo was delivered to the libellant at New Orleans, Louisana.

The libel also asserted that the alleged demand was accompanied by an offer to pay the expenses of discharging libellant's cargo at Colon, and to pay all costs which might be incurred by the way of restoring other cargo which it might be necessary to remove in order to discharge the cargo of the libellant.

The libel, however, did not allege that at the time of making the alleged demand any effort was made to furnish to the steamship proper wharfage facilities for discharging libellant's cargo at Colon. **The libel did not set forth that any average bond was tendered, in connection with the alleged demand.**

The libel concluded with the statement that by reason of the alleged failure of the Steamship "Eureka" to deliver the libellant's goods in accordance with the alleged demand, such goods arrived at the port of New Orleans in so deteriorated a condition, as to cause the libellant damage in the sum of Ten thousand dollars. The libel contained no specific statement of the character of the damage suffered.

On the 31st day of July, 1916, the Steamship "Eureka" was attached by the United States Marshal for the Western District of Washington, and on the 1st day of August, 1916, the Alaska Steamship Company entered its appearance as claimant and owner of the Steamship "Eureka," and on the 16th of November, 1916, filed its answer to said libel.

The answer alleged that on the 8th day of September, 1915, the Steamship "Eureka" was owned by the Pacific Coast Steamship Company, which company chartered the ship to the Crossett Western Lumber Company, which company in turn sub-chartered the ship to H. M. Williams & Company, which company in turn sub-chartered the ship to the Oregon-California Shipping Company, and that the

shipments referred to in the libel were delivered to the Oregon-California Shipping Company for carriage from the ports of New York and Philadelphia to San Francisco, California, by way of the Panama Canal, and that the said Oregon-California Shipping Company issued to the libellant bills of lading prescribing the terms of carriage of the cargo, and that the libellant paid to the Oregon-California Shipping Company, in advance, the freight for the carriage of said shipments.

The answer further alleged that the shipments in question were never delivered to the consignees at the respective destinations, but that all of the shipments were delivered to the libelant at New Orleans, Louisiana, at the libellant's special order and request.

The answer denied that the Steamship "Eureka" had failed to perform its contract of carriage. The answer denied that any demand was made upon the steamship for delivery of the cargo at the port of Colon, and further denied that the steamship at any time refused to make such delivery.

The answer then set forth, as the true facts of the transactions referred to in the libel, the general history of the "Eureka's" departure from New York and Philadelphia with the cargo in question, and its detention at the Atlantic entrance to the Panama Canal, by virtue of the slides which occurred therein. It further alleged by way of defense, the impossibility of continuing the voyage on account of said slides.

It then set forth the history of the conditions which confronted the Master of the ship caused by the slides in the Panama Canal, and referred to the various provisions of the bills of lading providing for contingencies of this character. The material parts of the provisions referred to were as follows:

> "1. It is mutually agreed * * * that in case the steamer shall * * * be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamer; * * * that the carrier shall not be liable for loss or damage occasioned by causes beyond his control or accidents of navigation of whatsoever kind, * * *; that the carrier shall not be liable for loss or damage occasioned by * * * change of character, * * * or any loss or damage arising from the nature of the goods * * * nor for any loss or damage caused by the prolongation of the voyage."

> "2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transhipment."

> "8. When the loading, transport, transhipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be en-

titled to load, discharge, tranship, put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all expenses of transhipment or warehousing of Customs, * * * and all extra expenses of whatever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods."

The answer then continued to set forth the history of the efforts made to tranship the cargo by the different routes already referred to, as well as by the Straits of Magellan, and further alleged that while the steamship was so detained at Colon the libellant insisted and demanded that its cargo be transhipped, and that it would hold the ship liable if its cargo was taken by the Straits of Magellan.

It then continued to allege that after the ascertainment of the fact that the Canal would not be opened within a reasonable time, and the further fact that all efforts to accomplish a transhipment were futile, the Master, acting in the interests of all the consignors and consignees, proceeded on the 5th day of November, 1915, to the port of New Orleans, where she arrived on the 12th day of November, 1915, and that on October 24th, 1915, and prior to the time that the Steamship "Eureka" proceeded to New Orleans, all of the consignees of cargo, including the libellant, were advised that the steamship would be sent to New Orleans for the discharge of her cargo,

and that the libellant and its agent, F. H. Murray, received said notice, and immediately thereafter consented to the sending of the steamship to New Orleans, and the transhipment of libellant's cargo by rail, to its destination.

It then continued to allege that, in accordance with the request and order of the libellant, its cargo was delivered to it at Chalmette docks in New Orleans, Louisiana, between the 16th and 20th of November, 1915.

It then set forth as an affirmative defense the stereotyped provisions of the bills of lading excusing the carrier from damage to goods on account of inherent weakness, natural causes, evaporation, etc., and asserted that the damage, if any, to the cargo in question arose from one of the excepted causes, and that such damage must have arisen from the fact that the cargo was not in good order and condition at the time of shipment. It likewise alleged that the owners, charterers and agents exercised all diligence in the equipment and management of the vessel.

The answer then set forth the provisions of the bills of lading requiring notice of damage to be filed with the Steamship Company, and alleged that no such notice was filed within the time required by the terms of the bills of lading.

The prayer of the answer asked for a dismissal of the libel, and for a release of the attachment, at

the cost of the libellant. The issues created by these pleadings were substantially as follows:

The libellant contended that immediately after the slides in the Panama Canal took place, it made a demand upon the firm of L. Rubelli's Sons for a delivery of its cargo at the port of Colon. It further contended that the firm of L. Rubelli's Sons was the general agent of the Steamship "Eureka", and the proper party upon whom to make such a demand for the delivery of its cargo at the port of Colon.

It was insisted, on behalf of the steamship, that the firm of L. Rubelli's Sons was not the general agent of the steamship "Eureka", and that no demand was in fact, made for a delivery of the cargo at the port of Colon, and that such a demand, if made, created no liability upon the part of the steamship to respond in damages, and that the steamship performed all obligations resting upon it in reference to the cargo in question.

The case came on for trial on the 10th day of July, 1917, before the District Court of the United States, for the Western District of Washington, Southern Division, and the court, after hearing all the evidence, entered a decree in favor of the Steamship "Eureka" and the claimant, dismissing the libel.

The court's decision very exhaustively analyzed the evidence offered by the libellant in support of its claim that it had made a demand upon the firm of L. Rubelli's Sons for a delivery of its cargo at Colon.

The evidence offered in support of its claim was offered for the purpose of establishing that the firm of L. Rubelli's Sons, was the General Agent of the Steamship "Eureka", and, therefore, the proper party upon whom to make the alleged demand.

After examining this evidence, the court found that there was no proof of any written agreement defining the existence or scope of an agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, the special owner of the steamship.

The court likewise found that there was no evidence showing any act upon the part of the Oregon-California Shipping Company which could be construed as misleading the National Carbon Company upon the subject of any agency existing between the Oregon-California Shipping Company and the firm of L. Rubelli's Sons.

The court further found that Mr. Kurz, who was the general manager of the firm of L. Rubelli's Sons, and who was a witness on behalf of the National Carbon Company, testified that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and acted as limited agent only for the purpose of soliciting cargo on the Steamship "Eureka."

The court likewise found that the only information which was imparted to the Oregon-California Shipping Company by the firm of L. Rubelli's Sons concerning the subject of an alleged demand for a de-

livery of the cargo was Colon was a telegram of October 18th, 1915, sent by L. Rubelli's Sons to the Oregon-California Shipping Company, which read as follows:

"Philadelphia, Oct. 18, 1915.

Oregon-California Shipping Co.

National Carbon Company insist that shipments Eureka should not go via Magellan account batteries would be worthless on arrival destinations stop they offered pay all expenses discharging including loading back on board any other goods in order to forward their goods from Colon stop. We made them proposition our wire fourteenth which they state very satisfactory stop to avoid heavy claims better tranship cargo wire quick. L. Rubelli's Sons."

(Libelant's Exhibit 12.)

The court found, however, that the above telegram which was sent more than two weeks after the alleged demand for a delivery of the cargo at the port of Colon, which demand is alleged to have been made on October 1st, 1915, was not the transmission of a demand for delivery at Colon, but the submission of an entirely different proposition, and that when properly construed, the effect of such telegram was to lead the Oregon-California Shipping Company to believe that any desire for a delivery at Colon had been abandoned. In other words, the court construed the above telegram as directly nega-

tiving the idea of a demand for the delivery of the cargo at the port of Colon.

It developed upon the trial that certain telegrams passed between the firm of L. Rubelli's Sons and the Captain of the "Eureka" while she was at the port of Colon, but the court found that such telegrams and communications were explainable on the theory that an effort was being made to procure new cargo for the "Eureka" through the assistance of L. Rubelli's Sons, who had solicited the first shipment, and upon the further theory that L. Rubelli's Sons were interested in advising the shippers of cargo on the voyage in controversy, of the conditions existing at Colon, and to assist them in transhipping their goods, if possible, in order to maintain the good will of such shippers.

The court further found, however, that the Captain of the ship carried out no orders from L. Rubelli's Sons involving the management of the ship.

The court, therefore, concluded that the appellant had failed to establish by direct proof, the existence of any general agency between the charterer of the Steamship "Eureka" and the firm of L. Rubelli's Sons, and then discussed the subject of an alleged agency by implication.

Upon this phase of the case, the court found an absence of any evidence establishing a state of facts sufficiently strong to support any implied general agency between the firm of L. Rubelli's Sons and the Steamship "Eureka." In other words, the court

found the absence of any proof of a continued course of dealing between the owners of the Steamship "Eureka" and the firm of L. Rubelli's Sons from which a general agency could be implied as a matter of law.

The court further found that:

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the 'Eureka', or for that matter, a claim of any kind."

The court further found that the charter involved in this controversy contemplated other voyages than the one in question, and that there was no evidence to show but that the firm of L. Rubelli's Sons terminated their connection with the Steamship "Eureka" at the termination of the present voyage. The court likewise found the absence of anything more than a general understanding that the firm of L. Rubelli's Sons would continue for an indefinite time to provide cargo on the "Eureka's" trips from the Atlantic seaboard.

From all of these findings, the court concluded that the record failed to establish by direct proof any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, and likewise concluded that no such general agency could be implied from a record which negatived the existence of any established course of dealing between the Oregon-California Shipping Company

and the firm of L. Rubelli's Sons in relation to the handling of the Steamship "Eureka."

The trial court's able analysis of the evidence bearing upon this question of general agency, and the inevitable conclusion which followed therefrom, led the court to the further conclusion that the appellant's asserted claim against the steamship "Eureka" must fail, because the only groundwork laid as a basis to support such claim, was an alleged demand upon the firm of L. Rubelli's Sons for a delivery of the appellant's cargo at the port of Colon, and that such demand, whether sufficient in point of law or not, was made upon a party who had no authority to conform therewith.

From the action of the court in rendering its decision, the present appeal has been perfected.

The appellant assigns as error the action of the trial court in entering a final decree dismissing the libel, and in failing to hold the Steamship "Eureka" at fault on account of the acts set forth in the libel.

The appellee respectfully contends that the findings and conclusions of the trial court were in all respects correct, and that the action of the trial court in dismissing the libel should be affirmed, and as a basis for its contention submits the following points and authorities.

POINTS AND AUTHORITIES

I.

The appellee's theory of the present case is that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and that said firm had no authority to conform to the alleged demand of the National Carbon Company for a delivery of its cargo at the port of Colon; that the trial court was correct in finding the absence of any general agency between the firm of L. Rubelli's Sons and the National Carbon Company; that the record in this case offers no sufficient evidence of any demand for the delivery of the appellant's cargo at the port of Colon; that the Master of the Steamship "Eureka", as the agent of all parties having an interest in the voyage, exercised a reasonable discretion in taking the cargo to the port of New Orleans.

II.

The existence of an agency is a question of fact; the scope of an agency is a question of law.

Vol. 44 Century Digest, Principal and Agent, Secs. 724, 726.

III.

Where the evidence establishes both the fact of

and the scope of an agency, the court is not called upon to determine such scope as a proposition of law.

IV.

When an endeavor is made to charge a principal with the exercise of authority by an agent, as to certain specific acts, and such authority is to be implied from the performance of other acts, the evidence as to such other acts must show that such other acts involved the exercise of authority similar in character to the authority sought to be implied. An implied agency as to certain acts cannot be based on proof of an agency showing the performance of dis-similar acts.

Stratton vs. Todd, 82 Me. 149; 19 Atl. 111.

Hazeltine vs. Miller, 44 Me. 177, 179-181.

V.

When a party seeks to charge a principal with the acts of an alleged ostensible agent, there must be some showing that such party was misled by the act of the principal in holding out the ostensible agent, or that the ostensible agency was knowingly created by the principal.

VI.

A party cannot base a claim against a principal upon an alleged implied agency, limited in scope, of which limited scope such party had knowledge.

VII.

Where a ship is carrying a mixed cargo, and its voyage is temporarily interrupted, and one single shipper demands a premature delivery of its cargo before the ship reaches the ultimate destination, such demand must be accompanied by a tender of proper wharfage facilities for discharging the cargo, and by a tender of a bond to protect the ship against the reciprocal claims of all shippers, and the interests of no one shipper should ever at any time be preferred against the interests of all other shippers. It must further appear that the duration of the impediment is fixed and determined.

The Martha, 35 Fed. 314.

VIII.

The obligation of a carrier to complete the contract of carriage is only suspended, and is not abrogated by a temporary obstruction to the completion of the voyage.

Bennet vs. Bryam & Co., 38 Miss. 17; 75 Am. Dec. 90, 93.

Hand vs. Baynes, 4 Wharton. 204; 33 Am. Dec. 54, 55, 56.

IX.

The provision of a bill of lading allowing a carrier to tranship a cargo at the cost of the shipper

when the ship is confronted with unforseen difficulties is a proper, enforcible and reasonable provision.

Pacific Coast Co. vs. Yukon Independent Transportation Co., 155 Fed. 35.

X.

Where the provisions of a bill of lading provide that the carrier may tranship cargo at the expense of the shipper, the Master may take advantage of such provisions providing he does not take unreasonable advantage of the bargain.

The Citta De Messina, 169 Fed. 472, 474, 477.

XI.

In view of the fact that the Master is the agent of all parties concerned, including the owner, the ship and all of the shippers, no single shipper has the right to demand a premature delivery of its cargo during a temporary impediment to the progress of the voyage, to the detriment of the interests of the other shippers.

The Steamship Styria vs. Morgan, 186 U. S. 1.

XII.

When a Master is confronted with an unforseen difficulty, and a temporary impediment to the progress of his voyage such as an obstruction in a Canal,

it is the duty of the Master to remain at the entrance to the Canal until such time as the approximate continuation of the impediment can be finally determined.

Hand vs. Baynes, 4 Wharton. 204; 33 Am. Dec. 54, 55, 56.

XIII.

The Master of a ship is the agent of all parties concerned, and owes an equal obligation to the ship, its owner, and each and all of the shippers. When unforseen difficulties interrupt the progress of his voyage he is called upon to exercise a discretion, and such discretion means the absence of any fixed rule of conduct.

The Steamship Styria vs. Morgan, 186 U. S. 1.

The Kronprinzessin Cecilie, 244 U. S. 12.

XIV.

The Master, as the agent of the shippers, owes a duty to the shippers to tranship the goods at their cost when he is confronted with unforseen difficulties impeding the progress of his voyage, regardless of the bill of lading.

Shipton vs. Thornton, 9 Adolph & Ellis, 312-336.

XV.

Where the progress of a voyage is interrupted by some unforseen obstruction, and damage to a cargo ensues therefrom, such unforseen obstruction is the proximate cause of the injury, and the carrier cannot be held liable for the damages unless it is established that he was guilty of some negligence independently of the unforseen contingencies which was the proximate cause.

Empire State Cattle Co. vs. Atchison, T. & S. F. Ry. Co., 135 Fed. 135-140-141.

XVI.

Where the provisions of a bill of lading exempt a carrier from damage to goods by heat, and it appears that damage to a cargo comes within the provisions of such bill of lading, the burden is cast upon the cargo owner to show some negligence upon the part of the carrier in order to deprive the carrier of the benefit of such exceptions in the bill of lading.

The St. Quentin, 162 Fed. 883-884.

XVII.

"It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural

and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances."

Railway Company vs. Kellogg, 94 U. S. 469.

ARGUMENT.

The theory of the appellant's claim against the Steamship Eureka is confined solely to the alleged demand made upon the firm of L. Rubelli's for a delivery of its cargo at the port of Colon. This theory was announced by the proctors for the appellant upon the trial of this case, and is evidenced by the allegations of the libel.

The averments of the libel in this particular were as follows:

> "The agents of the S. S. 'Eureka' informed your libellant that the S. S. 'Eureka' was detained because of the closing of the Canal, and was then at the port of Colon. Your libellant immediately notified the agents for the said steamship 'Eureka' of the perishable character of the goods which your libellant had shipped on board the steamship 'Eureka' as aforesaid, and your libellant offered to pay for the discharge of the said goods, and in addition to pay all costs which might be incurred by the way of restoring other cargo on the steamship 'Eureka', which it might be necessary to move in order to discharge the cargo of your libellant and demanded the delivery of its said goods at Colon. * * * It was then discovered that the said cargo was badly dam-

aged, as a result of the failure of the said Steamship to perform its contracts as aforesaid, and the failure of those in charge of her to deliver to the libellant the said goods when demand for delivery thereof was made as aforesaid."

(Apostles on Appeal, Pages 9-10.)

The reference in the last quotation to the failure of the Steamship to perform its contracts, refers to prior allegations of the libel setting forth the impediments to the completion of the voyage on account of the slides in the Panama Canal and the alleged refusal of the Steamship's agents to deliver the cargo at the port of Colon.

In addition to the above allegations, the appellant confirmed its theory by the following statement which it set forth on page 14 of the brief submitted by its proctors to the trial court.

"The libelant is not suing for damages for delay, but is claiming damages for refusal of the Steamship owner to deliver his goods to him at Colon when demanded."

The only question, therefore, which the appellant presented to the trial court upon the hearing of this case, was the question of whether or not, the appellant had made a demand upon the Steamship "Eureka" for a delivery of its cargo at Colon, and whether the alleged refusal to conform to such de-

mand created a liability on the part of the steamship in favor of the National Carbon Company.

In other words, the appellant contended upon the trial of this case that it made a demand upon L. Rubelli's Sons, the authorized agents of the Steamship "Eureka", for a delivery of its cargo at the port of Colon, and that the failure of the steamship owners to conform to this demand resulted in an unwarranted delay of the cargo in the waters of the torrid zone, and consequent damage to the goods to the detriment of the owner. It also contended that the owners of the Steamship "Eureka" were legally liable to the appellant for their acts in causing this damage.

The appellee contended upon the other hand, that no demand for the delivery of the goods at the port of Colon was in fact made, and further contended that the firm of L. Rubelli's Sons was not the general agent of the steamship owners and was not therefore a proper party upon whom to make such a demand. The appellee further contended that the Steamship "Eureka" was under no obligation to deliver any portion of its cargo at Colon, even though a proper demand had been made. It contended in other words, that no single shipper of a mixed cargo can lawfully demand his portion of such cargo, during the continuance of a voyage, to the detriment of other cargo owners.

It, therefore, became incumbent upon the appellant to prove that a demand had been made for the

delivery of its cargo at the port of Colon, and that such demand was made upon the authorized representatives of the Steamship "Eureka."

The only evidence offered by the appellant on the trial of this case to prove the making of any demand for the delivery of its cargo at Colon was the following testimony of Mr. Anson Mitchell, its traffic manager, and Mr. Charles Kurz:

"Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel? A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates? A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

Q. How do you understand he is agent? A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis? A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz, of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the S. S. Eureka and her charterers, the Oregon-California Shipping Co.? A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you that they were agents of the company? A. Yes.

Q. More than once? A. At various times.

Q. Were they engaged in the business of the ship and its cargo? A. Yes.

Q. Were then engaged in the business of the ship and its cargo? A. Yes.

Q. They conducted negotiations with you in respect to that? A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you

saw these gentlemen in Philadelphia, what took place? A. I explained to them the detail and character of the goods, and at that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time? A. I did.

Q. What did you explain to them was the nature of these goods? A. I told them that the

nature of a dry battery is that after we ship a battery we are supposed to impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place."

(Libelant's Exhibit 1, pages 18, 19-20.)

Mr. Kurz testified as follows:

"Q. Do you remember whether Mr. Mitchell came down to Philadelphia about October 9th?

A. I do.

Q. Did he have any discussion with you then relating to these shipments?

A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23rd?

A. He did.

Q. Did he at that time repeat his offer?

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

A. He did."

(Testimony of Mr. Kurz, pages 137, 138, 139, Libelant's Exhibit 1.)

It thus appears that the only evidence offered by the appellant, in support of its alleged demand was a conversation between its manager and Phelps Bros. & Co., Mr. Kurz, Mr. Davis and Mr. Bates, each of whom was a member of the firm of L. Rubelli's Sons. Mr. Kurz was the general manager of L. Rubelli's Sons; Mr. Davis was the traffic manager of L. Rubelli's Sons; Mr. Bates was the assistant traffic manager of L. Rubelli's Sons. These facts appear from one of the appellant's own exhibits in-

troduced upon the trial of this case as Libelant's Exhibit 85.

In addition to the above testimony, Mr. Anson J. Mitchell, the traffic manager of the National Carbon Company, admitted upon cross examination, that no demand for the delivery of its cargo was made directly upon the Steamship "Eureka" or her Captain by the National Carbon Company, while she was detained at the port of Colon. His testimony upon this subject was as follows:

"Q. Where you ever at Colon? A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. Eureka which was shipped by the National Carbon Company during any time that the steamship Eureka was detained at the east side of the Panama Canal?

Mr. Welles: Objected to as incompetent, irrelevant and immaterial upon the issues in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, and the American Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I

could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the Eureka was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

Q. Did the National Carbon Company address any direct communication at any time while the Eureka was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof? A. No.

(Libelant's Exhibit 1, page 185-186.)

(Typewritten Transcript of Evidence, 211-212.)

The record of the appellant's own evidence limits its claim of a demand for the delivery of its cargo at Colon, to the conversation between its traffic manager, Mr. Mitchell, and the members of the firm of L. Rubelli's Sons, explaining to them the nature of appellant's cargo and discussing the advisability of

taking the goods out of the ship, which alleged conversation is modified by the further statements of Mr. Mitchell that he was never at the port of Colon, and that he had made no definite arrangements for the unloading or the transhipment of the cargo in the event that the same was delivered to him at Colon, augmented by the further admission that no demand for the delivery of the cargo was ever made upon the steamship or its Captain.

The appellant has based its entire claim of $10,000.00 upon this alleged conversation between Mr. Mitchell, its traffic manager, and the members of the firm of L. Rubelli's Sons. It, therefore, becomes necessary at the very outset of this controversy to determine whether or not the firm of L. Rubelli's Sons was the general agent of the Steamship "Eureka" or its owners and the proper party upon whom to make a demand for the delivery of its cargo at Colon.

In order to properly consider the question of agency as involved in the case at bar, the court should constantly keep in mind the ultimate consequences necessarily anticipated by a failure to conform to the alleged demand. Such a constant consideration of those ultimate consequences will impress the reader with their gravity. This in turn will emphasize the importance of requiring a high degree of proof to establish agential authority sufficiently broad in scope to embrace power to determine such consequences for another. Such consideration will likewise give a deeper insight into the trial

court's decision and bring to view his careful consideration of the evidence in this case.

The National Carbon Company had knowledge of the extraordinary difficulties which confronted the Steamship "Eureka" at the port of Colon, and likewise had knowledge of the possible injury which might result in keeping its dry cells for too long a time within the limits of the torrid zone. According to the allegations of its own libel, it informed the agents of the Steamship Company of the damage to the cargo which would necessarily ensue, and continued such notification for a long period of time. The allegations of the libel in this particular are extremely strong. Such allegations are as follows:

> "Thereupon your libelant repeatedly renewed the said request and demanded of those representing the said Steamship 'Eureka' that this cargo be delivered at once to your libelant at Colon, again notifying those representing the said steamship that unless such a delivery was made the cargo would be a total loss because of its perishable nature."
>
> (Apostles on Appeal, bottom of page 9 and top of page 10.)

The paragraph of the libel from which the above excerpt is taken begins with the assertion, that the National Carbon Company knew of the conditions confronting the Steamship Eureka, on account of the slides in the Canal, as early as October 1st, 1915, and immediately thereafter notified the Steamship's

agents of the perishable character of the cargo and made a demand for its delivery at Colon. It, therefore, appears from the appellant's affirmative admissions that during the entire period of the difficulties out of which the present controversy arose, it had full knowledge of the vital consequences which would follow from a failure to deliver the cargo at Colon and must, therefore, have been fully impressed with the importance of making so crucial a demand upon the proper party.

When the evidence offered to establish the alleged agency between the Steamship Eureka and L. Rubelli's Sons is viewed in the light of these important and admitted circumstances, it becomes much easier to determine the value of such evidence when offered in support of an implied agency.

It must constantly be borne in mind that the appellant has at no time attempted to estabish an agency between the Steamship Eureka and L. Rubelli's Sons by any written authority or by any affirmative oral authority.

The alleged agency rests solely upon indirect evidence, from which evidence the appellant is asking the court to imply an agency sufficiently broad in scope to maintain a legal liability against the Steamship Eureka, on the basis of an alleged demand made solely upon such agent.

The undisputed evidence introduced upon the trial of this case, establishes the fact of an existing agency between the shippers of the cargo on the

Steamship Eureka, on this particular voyage, and the firm of L. Rubelli's Sons and the Steamship "Eureka." This agency, however, was confined solely to the acts of L. Rubelli's Sons in soliciting cargo for the Steamship Eureka and in soliciting space for such cargo. This fact appears from the testimony of Mr. Charles Kurz, a witness produced on behalf of the appellant itself. The testimony of Mr. Kurz in this particular was as follows:

> "Q. You did not at any time claim to anyone or with anyone to be the general agent of the Oregon-California Shipping Company? A. Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Co.
>
> Q. I hand you now Libelant's Exhibit 39, in which you use the phrase 'in reply we beg to refer you to our letter of December 3rd, wherein we advised you that Messrs. Phelps Brothers & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer?'
>
> A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different sub-agents but only as to the solicitation of cargo.
>
> Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every

kind and nature of the Oregon-California Shipping Co? A. We were only the general agents in so far as picking up freight was concerned; booking freight.

(Testimony Mr. Kurz, Libelant's Exhibit 1, pages 149-150.)

(Typewritten Transcript of Evidence, 167 to top of 169.)

The testimony above set forth, which came from the mouth of one of the appellant's own witnesses, establishes affirmatively the fact of a limited agency between L. Rubelli's Sons, of which firm Mr. Kurz was general manager, and the Oregon-California Shipping Company, the sub-charterer of the Steamship Eureka, and at the same time negatives the existence of any general agency between L. Rubelli's Sons and the charterers of the Steamship Eureka.

In addition to the above testimony, the appellant introduced in evidence, upon the trial of this case, a letter bearing date December 3rd, 1915, in which appears the following statements:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. Rubelli's Sons

STEAMSHIP AGENTS — GENERAL FORWARDERS—CUSTOM HOUSE BROKERS

Pier 16 S. Delaware Ave.
(Foot of Dock Street)

Notaries Public Lightermen

PHILDELPHIA, Dec. 3, 1915.

In your reply please refer to.....

National Carbon Company,
Cleveland, Ohio.

Gentlemen:

S. S."Eureka"

Your favor of the 1st inst. addressed to Messrs. Phelps Bros. & Co. and ourselves is at hand and in reply we beg to advise you that Messrs. Phelps Bros. & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., of Portland.

Neither Messrs. Phelps Bros. & Co. or ourselves had any interest other than in the capacity as agents as above outlined.

All we can do under the circumstances is to refer your letter to Mr. H. M. Williams, General Manager of the Oregon-California Shipping

Co. of Portland, who we understand is still at New Orleans.

Yours very truly,

L. RUBELLI'S SONS,

CK/B Chas. Kurz.

Cy Phelps Bros. & Co., N. Y.

H. M. Williams, General Manager,
Oregon-California Shipping Co., Inc.,
% Santa Fe Ry., New Orleans, La.

(Libelant's Exhibit 33 attached to typewritten Transcript of Evidence.)

The above letter introduced by the appellant itself as part of its own case, corroborates the oral testimony of Mr. Kurz, and positively negatives the existence of any general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

In addition to the above letter, the appellant likewise introduced in evidence another letter bearing date December 8th, 1915, which reads as follows:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. RUBELLI'S SONS

STEAMSHIP AGENTS—GENERAL FORWARDERS—CUSTOM HOUSE BROKERS

Pier 16 S. Delaware Ave.
(Foot of Dock Street)

Notaries Public Lightermen

Philadelphia, Dec. 8, 1915.

In Your reply please refer to.....

Mr. A. J. Mitchell, Traffic Mgr.,
The National Carbon Co.,
Cleveland, O.

Dear Sir:—

Your favor of 6th instant addressed to Messrs. Phelps Bros. & Co., New York, and ourselves with regard to batteries shipped on the SS "Eureka" is at hand.

In reply we can only repeat what we wrote you on the 3rd instant, and are, therefore, referring your letter of 6th instant to Mr. H. M. Williams, General Manager of the Oregon-California Shipping Co. of Portland, who we understand is still at New Orleans.

Yours very truly,

L. RUBELLI'S SONS,

CK/Go. Chas. Kurz.

CC to Mr. H. M. Williams,
Phelps Bros. & Co. N. Y.

(Libelant's Exhibit 37 attached to typewritten Transcript of Evidence.)

The letter above set forth, which was introduced in evidence by the appellant itself, confirms the oral testimony of Mr. Kurz by confirming the statements contained in the letter of December 3rd, 1915, above set forth.

In addition to the above letters, the appellant likewise introduced a letter bearing date January 13th, 1916, which reads as follows:

Stevedores Cable Address Wharfage
Talleymen "Rubelli" Weighers

L. RUBELLI'S SONS

Steamship Agents—General Forwarders—Custom House Brokers.

Pier 16 S. Delaware Ave.
Foot of Dock Street)

Notaries Public Lightermen

Philadelphia, Jan. 13, 1916.

In your reply please refer to.....

Mr. A. J. Mitchell, Traffic Mgr.,
National Carbon Co.,
Cleveland, O.

Dear Sir:

SS. "Eureka"

Your letter of 11th instant addressed to the

Mannheim Insurance Co., Oregon-California Shipping Co., Phelps Bros. & Co., and ourselves, is at hand.

In reply we beg to refer you to our letter of Dec. 3, wherein we advised you that Messrs. Phelps Bros. & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., of Portland.

Neither Messrs. Phelps Bros. & Co. nor ourselves had any interest other than in the capacity as agents, as above outlined.

We are referring your letter to the Oregon-California Shipping Co., Portland, Ore., and shall be pleased if you will address them all future letters on this subject, instead of addressing same to Phelps Bros. & Co. or ourselves.

We can assume no responsibility whatsoever in the premises.

Yours very truly,

J. H. PELLY,
Liquidator.

Stamped
Received
14 Jan., 1916.

(Libelant's Exhibit 39, attached to typewritten Transcript of Evidence.)

The above letter in turn confirms the oral testimony of Mr. Kurz, and the other letters already referred to negativing the existence of a general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

In addition to the above, the appellant introduced in evidence another letter bearing date January 13th, 1916, which reads as follows:

PHELPS BROTHERS & CO.,
17 Battery Place New York.
327 South La Salle Street, Chicago.
Chamber of Commerce Bldg., Boston.
Cablegrams, Phelps, New York.

New York, January 13th, 1916.

National Carbon Company,
Cleveland, O.

Gentlemen:—

Attention of Mr. Anson J. Mitchell, Traffic Manager.

We have your favor of the 11th. inst. respecting shipments of dry battery cells on the S/S "Eureka". As per our previous letters, we beg to advise that it will be necessary for you to discuss this particular subject of claims on your shipments per above steamer direct with the Oregon-California Shipping Company, Portland, Oregon.

We only acted as agents and have no connection with these people at present, and are, therefore, not in a position to give you a proper reply in reference to your claims.

We would appreciate, therefore, if you will address the Oregon-California Shipping Company in reference to the matter, and we have no doubt that they will advise you fully what they are disposed to do.

Yours truly,

PHELPS BROTHERS & CO.,
AGENTS.
Per J. U. English.

JE/HBD
(Copy to Rubelli)
(Copy to Oregon-California Shipping Co.)

(Libelant's Exhibit 40, attached to typewritten Transcript of Evidence.)

The above letter likewise confirms the oral testimony of Mr. Kurz and completes the chain of letters introduced by the appellant itself, as affirmative assertions, negativing the existence of any general agency between the Oregon-California Shipping Company and L. Rubelli's Sons.

We have then the oral testimony of Mr. Chas. Kurz, a witness on behalf of the appellant, to the effect that L. Rubelli's Sons, of which firm Mr. Kurz was general manager, was the agent of the Oregon-Cali-

fornia Shipping Company or the Steamship Eureka, only for the purpose of soliciting space for cargo. This testimony is in turn corroborated by the letter of December 3rd, 1915, the letter of December 8th, 1915, the letter of January 13th, 1916, and the further letter of January 13th, 1916, all of which have been set forth above, positively stating, that the firm of L. Rubelli's Sons, "acted only as agents in the solicitation and providing of cargo, * * * and had no other interest than in the capacity as agents as above outlined."

It should be constantly remembered that the testimony of Mr. Kurz was introduced by the appellant itself and each one of the letters referred to was introduced by the appellant itself and, therefore, the negation of a general agency appears from the face of the appellant's own record.

According to the allegations of the appellant's own libel the appellant learned on October 1st, 1915, that the Panama Canal was closed to navigation and immediately notified the agents of the Steamship Eureka of the perishable character of the goods which the appellant had shipped thereon, and immediately demanded a delivery of the goods at Colon and likewise notified the agents of the steamship that the cargo would be a total loss if they did not conform to such demand. These allegations appear in the seventh paragraph of the libel on pages nine and ten of the Apostles on Appeal. In spite of these allegations, however, the appellant itself introduced in evidence a telegram addressed to the Oregon-Cali-

fornia Shipping Company demanding transhipment of its cargo, which demand was made as late as October 25th, 1915, more than three weeks after the appellant had learned of the slides in the Panama Canal and the consequent difficulties which confronted the Steamship Eureka. The telegram referred to reads as follows—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Oct. 25, 1915.

Oregon-California Shipping Co.,

Railway Exchange Bldg., Portland, Oregon.

Confirming notice to your agents Rubelli, Philadelphia, in person October ninth, by telephone October fourteenth, sixteenth and nineteenth, and in person October twenty-second and twenty-third by our Traffic Manager A. J. Mitchell, we demand and insist our cargo valued about fifteen thousand dollars on steamer Eureka, be transshipped immediately, our expense. Should Eureka containing our cargo proceed via Magellan, we will hold you and owners legally liable for value of goods and damages. Our cargo perishable and worthless unless transshipped immediately and hurried to

destination. Considerable damages already accrued by reason your failure to transship in accordance our instructions October ninth. Have informed Rubelli we will agree to proposition they wired you fourteenth.

NATIONAL CARBON COMPANY.

FB

(Printed on side)

COPY FOR OUR FILES.

(Libelant's Exhibit 17, attached to typewritten Transcript of Evidence.)

If it is true that as early as October 1st, 1915, the appellant made a demand upon L. Rubelli's Sons for the delivery of its cargo at Colon, believing that the firm of L. Rubelli's Sons was the general agent of the Steamship Eureka and its charterers, then why did the appellant as late as October 25th, 1915, more than three weeks after the alleged demand for delivery at Colon, make a demand for the transhipment of its cargo and make such demand directly upon the owners of the Steamship.

According to the allegations of the libel above referred to, the alleged demand of October 1st, 1915, for the delivery of its cargo at Colon was of far greater importance than the demand for the transhipment of October 25th, 1915, because, according to the allegations of the libel, the appellant was very solicitous on October 1st, 1915, to procure its cargo, on account of

its alleged perishable character; and yet more than three weeks thereafter, during which time the Steamship had been detained in the waters of the torrid zone, the appellant was insisting that the same cargo be transhipped.

The alleged demand of October 1st, 1915, for the delivery of the cargo at Colon, which according to the libel was the all important demand, was made upon the firm of L. Rubelli's Sons whom the appellant considered to be the agent of the Steamship and the owners. The less important demand, however, of October 25th, 1915, was made, not upon the firm of L. Rubelli's Sons, but directly upon the owners of the Steamship.

Furthermore, in the telegram last referred to, the appellant states that it had informed Rubelli that it would agree to the proposition submitted on October 14th. We are unable to find in the record the proposition referred to, but if such proposition did in fact exist, and, as is now contended, L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company, then why was it necessary for the appellant to advise the special owner that they would agree to the proposition submitted by L. Rubelli's Sons?

In addition to the above evidence, the appellant, on October 27th, 1915, almost a month after it learned of the conditions in the Panama Canal, sent a telegram directly to the Oregon-California Shipping Co. as the special owner of the Steamship Eureka,

demanding a transhipment by the cheapest and quickest route. The telegram referred to was as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Oct. 27, 1915.

Oregon-California Shipping Co.,
Railway Exchange Bldg.,
Portland, Ore.

Our representative Murry Los Angeles advises you wired considering transshiping at New Orleans. If you do this you must protect on our goods same rate as can be obtained by forwarding across Isthmus and up Pacific Ocean. Not only valuable time lost but excessive rates and we demand forwarding via cheapest and quickest route.

NATIONAL CARBON COMPANY.

FB

(Libelant's Exhibit 20, attached to typewritten Transcript of Evidence.)

On November 3rd, 1915, more than month after the appellant learned of the conditions in the Panama Canal Zone, it made another demand directly upon the special owner for information concerning the shipment. This telegram is as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 3, 1915.

Oregon-California Shipping Co.,
Railway Exchange Bldg.,
Portland, Oregon.

Must have immediate information regarding your intention reference our batteries now on Eureka.

NATIONAL CARBON COMPANY.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 23, attached to typewritten Transcript of Evidence.)

On November 4th, 1915, more than a month after

the appellant learned of the conditions in the Panama Canal Zone and on the very day when the Steamship Eureka set sail for New Orleans, the appellant again made a demand directly upon the special owner for information. This telegram was as follows:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 4, 1915.

Oregon-California Shipping Co.,
Railway Exchange,
Portland, Oregon.

Some immediate action must be taken to get batteries on Eureka forwarded. Every day's delay means more damage which you must stand. Wire quick your intentions.

NATIONAL CARBON COMPANY.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 25, attached to typewritten Transcript of Evidence.)

On November 5th, 1915, more than one month after the appellant learned of the conditions in the Panama Canal Zone and after the Steamship Eureka had set sail for New Orleans, it made another demand upon the special owner. This demand was contained in the following telegram:—

BRANCH TELEGRAPH OFFICE

Cor. Madison Ave. & 117th St., N. W.

TELEGRAM

Day Letter.

Cleveland, Ohio, Nov. 5, 1915.

Oregon-California Shipping Co.,
Chas. Kurz, Railway Exchange,
Portland, Oregon.

Owing to delay am afraid batteries on Eureka have deteriorated to such extent cannot be used to general public. Must have option of making test when cargo discharged from Eureka. May find it necessary to return them to factory. Advise when anticipate unloading so can arrange if necessary to be on ground for testing. Hurry disposition.

A. J. Mitchell.

FB
(Printed on side)
COPY FOR OUR FILES.

(Libelant's Exhibit 27, attached to typewritten Transcript of Evidence.)

On October 25, 1915, the appellant wrote a letter to L. Rubelli's Sons from which letter it appears that the appellant while in the offices of L. Rubelli's Sons dictated a communication directly to the Oregon-California Shipping Company, which letter reads as follows:—

NATIONAL CARBON COMPANY

Cleveland, Ohio, U. S. A.

Mark Reply AJM
Oct. 25, 1915.
File

L. Rubelli's Sons & Co.,
Mr. F. W. Davis, Traf. Mgr.,
Pier 16, South Wharves,
Philadelphia, Pa.

My dear Mr. Davis,

In thinking over telegram which was dictated in your office, some way or other it did not appear to cover the situation as I wanted it, so I held it until my return this morning and sent the following telegram:—

"Confirming notice to your agents Rubelli, Philadelphia, in person October 9th, by telephone October 14th, 16th and 19th, and

in person October 22nd and 23rd by our Traffic Manager, A. J. Mitchell, we demand and insist our cargo valued about $15,000.00 on SS Eureka, be transhipped immediately, our expense. Should Eureka containing our cargo proceed via Magellan, we will hold you and owners legally liable for value of goods and damages. Our cargo perishable and worthless unless transhipped immediately and hurried to destination. Considerable damage already accrued by reason your failure to tranship in accordance our instructions October 9th. Have informed Rubelli we will agree to proposition they wired you 14th."

This, I believe, puts it a little stronger than the telegram written when in your office. I do not think any time has been lost, as the telegram left here this morning about ten o'clock, and should reach them at least by nine or ten o'clock, today, and that gives it three hours to be transmitted.

I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined or sees fit.

In case something new develops in the morn-

ing, please wire me or call me on the long distance telephone so that I may be kept posted.

Thanking you for the kindness shown while in your beautiful little city, and with kindest regards, I am,

Yours very truly,

Anson J. Mitchell,

Traf. Mgr.

(Libelant's Exhibit 70, attached to typewritten Transcript of Evidence.)

It appears from the above letter that the representative of the appellant visited the offices of L. Rubelli's Sons on October 23rd, 1915, and while in their office, dictated a telegram directly to the Oregon-California Shipping Company, the special owner of the Steamship Eureka.

If, as is now contended, the appellant at all times considered that L. Rubelli's Sons were the general agents for the Oregon-California Shipping Company, then why did the appellant deem it necessary to go over the heads of L. Rubelli's Sons and communicate directly with the special owner and dictate this communication in the very office of L. Rubelli's Sons?

In addition to all of the above evidence negativing the claim that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Com-

pany, the following very significant statement appears in the letter last submitted:—

> "I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined or sees fit."

It must again be recalled that Mr. Kurz, the gentleman just referred to in the last quotation, was the general manager of L. Rubelli's Sons. According to this last quotation, Mr. Kurz was apparently on his way to Portland, Oregon, to interview the special owner of the Steamship with reference to the problems out of which the present controversy arose.

If, however, as is now contended, the appellant considered that L. Rubelli's Sons were the general agents of the Steamship and the special owner, then why did it express itself as late as October 25th, 1915, more than three weeks after its alleged demand for the delivery of its cargo at Colon, as hoping that the general manager of L. Rubelli's Sons would be given authority, "to handle the transaction in the manner he (Kurz) has outlined or sees fit"?

It should likewise be constantly recalled to mind that each of the letters and telegrams above referred to, containing these positive statements negativing the existence of a general agency between L.

Rubelli's Sons and the Oregon-California Shipping Company, together with the statements therein contained negativing the existence of any belief in the mind of the appellant that L. Rubelli's Sons had full authority, "to handle the transaction," were exhibits introduced in evidence by the appellant itself and, therefore, the statements therein contained rise virtually to the dignity of admissions.

Amplifying and augmenting all of the above conclusive admissions, the appellant introduced in evidence a letter bearing date October 22nd, 1915, written by L. Rubelli's Sons in which said firm expressly denies the assumption of any responsibility for the actions of the steamer, her owners, charterers or the Oregon-California Shipping Company or others concerned. This letter in part reads as follows:

> "Our interest in the S. S. "Eureka" and her cargo was merely as agents for the Oregon-California Shipping Company, Inc., of Portland, Oregon, but we feel that the matter of getting these goods to destinations is one in which we should strongly concern ourselves. * * * We make the suggestion without assuming any responsibility whatsoever for the actions of the steamer, her owners, charterers or the Oregon-California Shipping Company, Inc. of Portland, Oregon, or others concerned * *. The above proposition has already been accepted by one of the large interests involved, i. e., the National Carbon Company, of Cleveland, Ohio."

(Excerpt from Libelant's Exhibit 14, attached to typewritten Transcript of Evidence.)

In addition to the statements contained in the letter last quoted denying the existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company, the said firm of L. Rubelli's Sons affirmatively state that a proposition presented by them, independently of the special owner of the Steamship, had been accepted by the National Carbon Company of Cleveland, Ohio, the appellant in this case.

If the National Carbon Company had at all times acted on the belief and assumption that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company and were responsible to the National Carbon Company for the acts of the ship, then why did the appellant enter into this agreement with L. Rubelli's Sons for the purpose of acting independently of the special owner, the Oregon-California Shipping Company?

This very letter, which was introduced by the appellant, and the statements of which are approved and vouched for by the appellant, shows affirmatively that L. Rubelli's Sons directly denied the existence of any responsibility for the acts of the Steamship or its owners, and so advised all of the shippers.

All of the above letters and telegrams which were introduced in evidence by the appellant itself,

establish conclusively that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, the special owner of the vessel, and further establish that the firm of L. Rubelli's Sons was only a limited agent. They likewise establish that the National Carbon Company, the appellant in this case, new, during the full period of the transactions involved in this controversy, that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company.

These letters and telegrams likewise establish that the appellant made many demands directly upon the Oregon-California Shipping Company, the special owner, and these acts, which speak more loudly than the words themselves, establish knowledge on the part of the appellant, that the Oregon-California Shipping Company was the only proper party upon whom to make a demand concerning any of the vital problems arising in connection with the extraordinary happening which gave existence to the present controversy.

It affirmatively appears from these exhibits that the firm of L. Rubelli's Sons denied the existence of any general agency between themselves and the Oregon-California Shipping Company.

It affirmatively appears from these exhibits that the appellant adopted the practice of making important demands upon the Oregon-California Shipping Company directly, thus eliminating any inference

that it considered the firm of L. Rubelli's Sons the proper party upon whom to make such demands.

It affirmatively appears from these exhibits that as late as October 25th, 1915, more than three weeks after the appellant had gained knowledge of the circumstances, it expressed the hope that the general manager of L. Rubelli's Sons would be given authority to handle the transaction.

It affirmatively appears from these exhibits that the appellant sent a communication directly from the offices of L. Rubelli's Sons to the Oregon-California Shipping Company, again eliminating the inference that it at any time considered full authority vested in L. Rubelli's Sons.

It affirmatively appears from these exhibits that as late as October 25th, 1915, the appellant was still demanding of the special owner a transhipment of its cargo, thus eliminating any possible inference that there existed in the minds of the officers of the appellant any idea that the alleged demand for the delivery of the cargo of October 1st, made upon L. Rubelli's Sons was a sufficient demand or one to which the appellant attached any importance.

It affirmatively appears from these exhibits that the appellant negotiated with the firm of L. Rubelli's Sons independently of the special owner of the vessel, which fact again negatives any belief on the part of the appellant that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company.

It affirmatively appears from the testimony of Mr. Kurz, a witness produced by the appellant itself, that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company and was only a limited agent for the purpose of soliciting cargo.

All of the above allegations appear from the appellant's own evidence. All of the above affirmations are vital admissions on the part of the appellant.

In opposition to all of these admissions, the appellant contended in the court below, and now contends, that a general agency existed between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company. It did not offer, and does not now offer, any direct evidence establishing any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, but contends that the facts disclosed by the record establish a course of dealing from which facts the court should imply a general agency. It further contends that the National Carbon Company was led by such facts to believe that such a general agency existed and relying upon such belief, made the demand upon which the appellant now rests its entire claim.

Upon the trial of this case, the appellant presented to the court as the facts from which it implied such agency the following.

In the first place, it contended that the following letter head appearing on Libelant's Exhibit 85 con-

stituted the first link in the chain of circumstances establishing by inference, a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company. The letter head referred to was as follows:

Atlantic Coast Thru Panama Canal Pacific Coast
O. C.

OREGON-CALIFORNIA SHIPPING CO., INC.

"Quaker Line"

Pier 16, South Wharves
(Foot of Spruce St.)

L. RUBELLI'S SONS
General Agents

Phones:
Bell, Lombard 41-34
Keystone, Main 27-16

Chas. Kurz, General Manager
F. W. Davis, Traffic Manager
R. B. Bates, Ass't Traffic Manager

Philadelphia, Pa., September 4, 1915.

National Carbon Company,
Cleveland, Ohio

Gentlemen:—

Confirming wire of even date we will accept your one car of batteries for Los Angeles and one car for San Francisco on the S. S. "Eureka" at 50c per hundred pounds.

We enclose herein shipping instruction blanks and would ask that you kindly send us instructions promptly together with your railroad bill of lading.

If you can indicate to us the cubic space taken up by these goods would appreciate it very much.

Yours very truly,

R. B. Bates,

Asst. Traffic Manager.

(Libelant's Exhibit 85, attached to typewritten Transcript of Evidence.)

The appellant contended that the designation on the letter head above set forth constituted sufficient evidence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Company to warrant the National Carbon Company in believing that L. Rubelli's Sons had full and unlimited authority to act for the Oregon-California Shipping Company.

The substance of the letter, however, is in accord with the testimony of Mr. Kurz and in accord with the statements contained in the other exhibits above set forth, which establish that L. Rubelli's Sons acted only as agents for the procurement of space.

There was no evidence introduced upon the trial of this case showing that the above letterhead was

used with the knowledge and consent of the Oregon-California Shipping Company. There was no evidence introduced upon the trial of this case showing that the National Carbon Company was misled by the designation appearing upon said letterhead.

The trial court made the following finding in this particular:

> "There is no testimony that libelant was misled by the designation 'General Agents' after the words 'L. Rubelli's Sons' used upon this letterhead, or that the same was so used with the knowledge of the Oregon-California Shipping Company."
>
> (Apostles on Appeal, page 70.)

It cannot, therefore, be properly contended that the above letterhead, standing by itself, affords any basis for an inference of general agency.

There is not only an absence of evidence showing that the appellant was misled by the designation upon this letterhead, but, as already shown above, the affirmative record introduced in evidence by the appellant itself, establishes that no general agency did, in fact, exist between L. Rubelli's Sons and the Oregon-California Shipping Company, and these affirmations preclude the possibility of any inference to the contrary.

The party who established these affirmations should not now be allowed to evade their effect, by

seeking shelter under a claim of inference, much less a claim of inference based upon a naked reference such as the above letterhead, without any showing that the letterhead was misleading to anyone, or that the Oregon-California Shipping Company had any knowledge of its use.

The appellant next contended that the bills of lading for the shipments from Philadelphia were signed by R. B. Bates, Assistant Traffic Manager of L. Rubelli's Sons, and that the bill of lading for the shipment from New York was signed by J. U. English. It contended that J. U. English was an employe of Phelps Bros. & Co., who in turn were the agents of L. Rubelli's Sons.

The appellant argues that the latter facts are evidence of a general agency. As already shown, however, the firm of L. Rubelli's Sons were the agents for the purpose of soliciting space only and for this reason probably authorized Mr. Bates to sign the bill of lading, although the record does not disclose the existence of any such authority. Furthermore the record does not disclose any authority in Phelps Brothers of New York, or any of its employees to execute the bills of lading.

The appellant likewise set forth an excerpt from the testimony of Mr. Kurz, which reads as follows:

> "Well, we did advertise ourselves as general agents in the east of the Oregon-California Shipping Company."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 149.)

On the very same page of the evidence, however, appears the further statement of Mr. Kurz that the general agency to which he referred related only to the solicitation of cargo. This statement was as follows:—

A. That is right, that is what we did do, the general agency that I referred to meant that we had charge of the different sub-agents but only as to the solicitation of cargo.

Q. In other words, you at no time held yourself out, and do not now, to have ever been the general agents in the broad general sense of a complete agency for all matters of every kind and nature of the Oregon-California Shipping Co.? A. We were only the general agents in so far as picking up freight was concerned; booking freight.

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 150.)

It must again be remembered, as already stated, that Mr. Kurz was a witness called by the appellant itself and the appellant vouches for the truthfulness of his statements. His statement as set forth in the last quotation directly negatives the fact of a general agency.

The appellant next contended that the testimony of Mr. Kurz appearing on page 136 of Libelant's Exhibit I, disclosed that L. Rubelli's Sons used the term "Quaker Line" in connection with the steamers that had sailed from Philadelphia to the Pacific Coast, and thus L. Rubelli's Sons must have been general agents of the Oregon-California Shipping Company.

They also referred to the testimony of Mr. Kurz, on page 137, wherein he states that H. M. Williams was president of the H. M. Williams Company, which chartered the Steamship Eureka from the Crossett-Western Lumber Company and that he, Williams, was also general manager of the Oregon-California Shipping Co., to which latter company the Steamship Eureka had been subchartered and contended that this testimony bears the impress of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co.

The appellant next contended that Libelant's Exhibit 48, which was a letter addressed to President Wilson, making an inquiry as to the possibility of reopening the canal, being a letter written by Mr. Kurz, wherein he stated that L. Rubelli's Sons had inaugurated service between Philadelphia and the West Coast of the United States and that their Steamship Eureka was then held up at the eastern end of the Panama Canal, was further evidence of a general agency.

The appellant next relied upon some statements in Libelant's Exhibit 14, which was a letter signed by

L. Rubelli's Sons and wherein it is stated, that as agents for the Oregon-California Shipping Co. they were in daily touch with the master of the ship, and that therefore a general agency was to be inferred therefrom.

The above references to isolated portions of the evidence and to isolated exhibits, constitute the entire state of facts upon which the appellant asked the trial court and now asks this court to base a legal conclusion of an implied agency.

The references to the record upon which the appellant relies are really more in the nature of inferences than facts and the appellant is virtually asking this court, as it did the trial court, to base an inference upon these inferences and deduce therefrom a legal conclusion, as to the existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co.

After reviewing all of these references and all of this testimony and all of these exhibits, the trial court very properly concluded as follows:—

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the 'Eureka' or, for that matter, a claim of any kind."

(Apostles on Appeal, page 74.)

The appellant very vigorously challenges the court's conclusion that the record in this case failed to establish any general agency between L. Rubelli's Sons and the Oregon-California Shipping Co. Such a vigorous challenge is necessitated by the fact that the appellant's entire claim is dependent upon the establishment of such an agency.

The record shows that the National Carbon Company was a very extensive shipper and that its traffic manager, Mr. Mitchell, was very familiar with shipping methods (Libelant's Exhibit 1, page 25); and yet with all this knowledge and information, the appellant now admits that it never at any time made a demand upon the master or the officers or the owner of the vessel, but relied solely upon the conversation wherein Mr. Mitchell told the members of the firm of L. Rubelli's Sons, that he would take the cargo over at Colon and pay the cost of discharging same.

The weakness of the appellant's position in this particular and the necessity of establishing the ground work of the claim set forth in its libel, discloses the reason for its excessive earnestness in urging upon this court, that the trial court was in error in finding the absence of any general agency.

The question of the existence or non-existence of an agency is usually a mixed question of law and fact. Technically speaking, the naked proposition of the existence of an agency, is a pure question of fact, while the scope of an agency is a question of law. This distinction is universally recognized and may

be verified by the cases set forth in: Volume 44, Century Digest, under the heading of Principal and Agent, Sections, 724, 726.

The evidence introduced by the appellant upon the trial of this case, however, for the purpose of establishing the general agency in question, between the firm of L. Rubelli's Sons and the Oregon-California Shipping Co., not only establishes affirmatively, the fact of a limited agency; but likewise establishes the scope of such limited agency.

The letter of December 3rd, 1915, addressed by L. Rubelli's Sons to the National Carbon Company states, "that Messrs. Phelps Brothers & Co. and ourselves acted only as agents in the solicitation and providing of cargo for this steamer at New York and Philadelphia for account of the Oregon-California Shipping Co., Inc., at Portland. Neither Messrs. Phelps Brothers & Co., or ourselves had any interest other than in the capacity as agents as above outlined."

The letter of December 8th, from L. Rubelli's Sons to the National Carbon Company re-affirms the declarations contained in the letter of December 3rd.

The letter of January 13th, 1916, from the liquidator of Phelps Brothers & Co. re-afirmed the statements contained in the letter of December 3rd, 1915.

The letter of January 13th, 1915, from Phelps

Brothers & Co. directed to the National Carbon Company, repudiated any authority on behalf of Phelps Brothers & Co. or L. Rubelli's Sons to negotiate for any matters concerning the settlement of claims.

The letter of October 22nd, 1915, addressed by L. Rubelli's Sons to all the shippers repudiated any responsibility whatsoever for the acts of the owners of the Steamship Eureka.

In addition to the above, the appellant introduced in evidence a telegram, reading as follows:

"Philadelphia, Pa., Oct. 16, 1915.

Oregon-California Shipping Company,
Railway Exchange Building,
Portland, Oregon.

You cannot store cargo since you have facilities get goods destination stop goods must be moved without any further delay otherwise will have heavy claims for your not taking prompt action stop will you permit our handling matter basis our wires fourteenth fifteenth wire authority together with full particulars suggested in our various wires stop if you object state objections fully are treating owners Edison Light also other per our wire fifteenth stop dont overlook Luckenbach availed of opportunity transship and that your duty was to act similarly stop will owner Eureka permit discharge cargo Colon or would he allow her proceed Puerto Mexico if we elect stop this is critical matter

and you should give us all information possible promptly to enable proper disposition.

L. Rubelli's Sons."

(Libelant's Exhibit 65.)

The above telegram was another one of the exhibits produced by the appellant itself, and the statements contained in such telegram are, therefore, binding upon the appellant.

It unquestionably appears from the above telegram, that L. Rubelli's Sons were seeking to obtain from the Oregon-California Shipping Company full authority to act in the premises, which absolutely negatives the proposition that they had full authority in the first instance. Furthermore, the above telegram, which is an admission by the appellant itself, proves conclusively that the appellant knew of the limited authority of L. Rubelli's Sons.

The testimony of Mr. Kurz above set forth positively states that L. Rubelli's Sons acted only in the capacity of agents for the solicitation of cargo and never held themselves out as general agents for all purposes.

In the letter of October 25th, 1915, addressed by the appellant to L. Rubelli's Sons, being Libelant's Exhibit 70, the appellant expressed a hope that Mr. Kurz, the general manager of L. Rubelli's Sons, would be given full authority to handle the

transactions in the manner he had outlined or saw fit, thereby establishing knowledge on the part of the National Carbon Company, of the limited scope of the agency which existed between L. Rubelli's Sons and the Oregon-California Shipping Co.

These letters and telegrams were introduced in evidence by the appellant itself and the appellant is bound thereby. The testimony of Mr. Kurz is the the testimony of a witness placed on the stand by the appellant and the appellant thereby vouches for the correctness and accuracy of such statements.

It thus follows in the case at bar, that the court is not only not called upon to determine the fact of a limited agency between L. Rubelli's Sons and the Oregon-California Shipping Co., but is not even called upon to determine the scope of such limited agency, because that very scope is established by the appellant's own evidence.

This positive testimony and these affirmative assertions, introduced in evidence and vouched for by the appellant itself, overcome in a most powerful manner the meager inferences which the appellant attempts to deduce from the isolated excerpts of testimony and the remote written statements upon which it relies.

The existence or non-existence of a general agency between L. Rubelli's Sons and the Oregon-California Shipping Co., becomes virtually a question of fact to be determined from the circumstances of this particular case, because, as already shown, the

fact of a limited agency and the extent of its limit, is established by the evidence itself.

Indeed, the question of a general agency is, as a rule, a matter to be determined from the peculiar facts of each particular case; but in addition to this, there is a rule of law which entirely overthrows the appellant's contention that the alleged general agency in the case at bar can be inferred from the isolated letter head of the Oregon-California Shipping Company, on the face of which appears the name of L. Rubelli's Sons as general agents, and from the letters and telegrams passing between the master of the ship and L. Rubelli's Sons.

In none of these letters and telegrams, to which the appellant refers, does there appear any statement, that L. Rubelli's Sons ever at any time exercised any authority over the Steamship Eureka or on behalf of the Oregon-California Shipping Company, analogous in character to the authority which would have been required in conforming to a demand for the delivery of the appellant's cargo at Colon. In other words, as stated by the lower court in its decision:—

> "There is no evidence of any single instance in which that company (L. Rubelli's Sons) acted upon or settled any disputed or questioned claim against the Eureka, or for that matter, a claim of any kind."

It is a well settled rule of law that any effort to establish an agency by inference, must be accom-

panied by a showing that the authority sought to be implied is of the same general character as the authority established by the facts upon which the inference is based.

This rule of law was announced by the Supreme Court of the state of Maine in the case of Stratton vs. Todd, 82 Me. 149, 19 Atlantic, 111. This was a case wherein the plaintiff sought to recover the value of services for driving logs. The plaintiff claimed that a man by the name of Mason, the agent of the defendant Todd, had agreed to pay the plaintiff for driving the logs. Mason's authority as agent was denied. It became incumbent upon the plaintiff to prove Mason's authority. The evidence showed that Mason had the agency in regard to the logs, but that it was confined to the disposal of them after they had been driven to the boom. The claim in suit was for driving them above the boom. The plaintiff contended that an implied agency existed, because the defendant had held out Mason as his agent. The court after finding that the agency between the defendant and Mason was confined to the disposal of the logs after they reached the boom, concluded as follows:—

> "Mason had an agency in regard to the logs, but it was confined to the disposal of them after they had been driven to the Penobscot boom. The claim in suit is for driving them above the boom. The duties and responsibilities of these two positions are so different that proof of an agency in one will have no tendency to show that

it exists in the other. Hazeltine v. Miller, 44 Me. 177. Besides, the case shows that, for all work to be done above the boom, Foster J. Tracy had the sole responsibility and control, by virtue of a written contract with the defendants.

Nor are the plaintiffs any more successful in relation to the other branch of their case. True it is that if the defendants have by their words or acts held out Mason as their general agent in respect to these logs, or in respect to this particular transaction, they might be estopped from denying such agency after the plaintiffs had in good faith acted upon such representations. But it is not pretended that the defendants have personally made any such representations. The most that is claimed is that Mason has performed certain acts in regard to the logs, which have been recognized as valid by the defendants. 'But the acts from which authority to do a specific act can be implied must be of the same general character and effect.' Hazeltine v. Miller, supra. It will be found on examination of the testimony that the acts relied upon to sustain this inference, with perhaps one exception, are such as pertain to the disposal of the logs after their arrival at the boom, and were within the acknowledged agency of Mason. As already seen, they were not of the same 'general character and effect' as making a contract for driving the logs above the boom. The single exception, that of the contract for driving in 1885, was founded upon a special

authority obtained for that purpose, and is not sufficient to prove a general, or any, custom, such as is necessary to authorize the inference of general authority."

(Stratton vs. Todd, 82 Me. 149, 19 Atlantic, 111.)

The record in this case discloses that L. Rubelli's Sons were the limited agents of the Oregon-California Shipping Company, for the purpose of soliciting cargo only. There is a vast difference between the duties and responsibilities of an agent who merely solicits cargo, and one who has authority to receive a demand for the premature delivery of a cargo, under such extraordinary conditions, as confronted the Steamship "Eureka" in the present case.

There has not been a scintilla of evidence introduced on the trial of this case, for the purpose of showing that the owners of the Steamship "Eureka" ever made any representations with reference to the general authority of L. Rubelli's Sons.

In the very language of the case just cited, the most that can be claimed is that L. Rubelli's Sons performed certain acts in regard to the cargo, which have been recognized as valid by the Steamship "Eureka" and its special owner, but the evidence fails absolutely to establish that the firm of L. Rubelli's Sons ever "acted upon or settled any disputed or questioned claim against the 'Eureka', or for that

matter, a claim of any kind." (Decision of trial court, page 74, Apostles on Appeal.)

Therefore, there is no proof of any single act involving the exercise of any authority by L. Rubelli's Sons, similar to the authority required to conform to the alleged demand for the delivery of the cargo at the port of Colon.

The same court in the decision of **Hazeltine vs. Miller, 44 Me. 177,** reiterated the rule announced, in the following language:

> "No rule of law is better established, or more universally recognized, than that the authority of an agent to act for, and bind, his principal, will be implied from the fact that such agent has been accustomed to performing acts of the same general character for that principal with his knowledge and assent. Nor is it necessary in order to constitute a general agent, that he should have done before an act, the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. Thus it was held in Bank of Lake Erie vs. Norton, 1 Hill R. 502, where by the articles of co-partnership, one Norton was created agent of a firm, but his authority as thereby defined did not extend to accommodation acceptances. It was proved, however, that he was the general agent of the firm, and, with their knowledge and assent, was in the habit of drawing

bills and making notes and indorsements for them; though the specific act of acceptance was not mentioned in the evidence, as one that had been usually done, the court decided that his general power and the usage of putting the firm name to commercial paper, in all other shapes, was the same thing in substance, and calculated to raise an inference in the public mind that he had such a power.

But the acts from which the authority to do a specific act can be implied must be of the same general character and effect. * * *

In the case at bar, the evidence shows satisfactorily that W. R. Miller was an agent for the defendant. That in that capacity he carried on his mills at the mouth of the Piscataquis; that he had paid the taxes on the defendant's property; that he gave permits for cutting timber on the defendant's land in Howland and Edinburgh, and collected the stumpage therefor; that he settled and received pay for lumber cut upon the defendant's land without authority. There was also evidence that on one occasion he gave a note to the town of Howland as the agent of the defendant. There is no evidence, however, that he had any authority to give the note, or that the defendant had any knowledge of its existence until long after it was given, or that he has ever recognized it as a valid note against him.

Now there is a wide distinction between authority in an agent to carry on mills for the owner; to permit parties to cut timber on his lands, and collect stumpage therefor; to claim indemnity from trespassers, and authority to enter into contracts for carrying on lumber operations, by which the principal was to be obligated to pay large sums of money. In the one case, the agent would be, in different modes, collecting for his principal money arising from the use or proceeds of the sale of his property; in the other, he would be embarking that principal in business enterprises which might involve large pecuniary liabilities and losses. Authority to embark in enterprises of the latter description could not be implied from an admitted agency with authority to perform acts of the former character.

As to the testimony of the witness, Muzzey, taken in connection with the letter of the defendant, it restricts, rather than enlarges, the authority of W. R. Miller as the defendant. No implication of authority to enter into the contract in question can arise from that transaction."

(Hazeltine vs. Miller, 44 Me. 177, 179-181.)

There has been no evidence introduced upon the trial of this case to show that the defendant or the special owners of the Steamship "Eureka" ever at any time had knowledge of the alleged demand made

upon L. Rubelli's Sons, for a delivery of the cargo at the port of Colon, or that they ever recognized or ratified the alleged refusal or non-refusal of L. Rubelli's Sons to deliver, or not deliver, the cargo in question, on the demand of the appellant.

As already stated above, there is a wide distinction between the authority necessary to solicit cargo, and the authority necessary to conform to a demand for the premature delivery of a cargo.

In the solicitation of cargo, L. Rubelli's Sons would be, in fact, collecting money for the Oregon-California Shipping Company, and would, in fact, be aiding the shippers in procuring space on the Steamship "Eureka."

In conforming to the alleged demand made upon L. Rubelli's Sons at the port of Colon, for the delivery of the cargo, they would be embarking the Oregon-California Shipping Company into an entirely new phase of financial liability, which arose on account of the extraordinary and unexpected contingencies created by the slides in the Panama Canal, which contingencies were neither in the minds of L. Rubelli's Sons nor of the Oregon-California Shipping Company at the time when L. Rubelli's Sons solicited the space for the cargo of the appellant.

We, therefore, respectfully submit that the ruling of the trial court upon the question of the alleged general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company was a correct ruling. The ruling is correct, not only as a

proposition of general law, but likewise in the application of such proposition of general law to the particular facts of the case at bar.

The importance of the ruling as applied to this particular case cannot be over-estimated. The extraordinary happening which gave rise to the facts constituting the present controversy, imposed upon the Steamship "Eureka" and her special owner a very difficult situation; and if the appellant seeks to impose a liability arising out of this extremely difficult situation, the appellant should, itself, be held strictly accountable for its own acts and conduct.

If, as is now contended, the appellant really desired a delivery of its cargo at the port of Colon, then certainly it should have made some effort to advise either the Master of the ship or the special owner of the ship of its desires in this regard, and not hope to be allowed to create so vast a liability on the basis of the meager conversation which took place between its Traffic Manager, Mr. Anson J. Mitchell, and the various members of the firm of L. Rubelli's Sons, in Philadelphia, Pa.

It should not be allowed to come into this court, or any other court, and establish a claim of $10,000.00, by attempting to construe such a conversation into a legal demand, in the absence of any showing whatsoever of any effort to make such demand either upon the special owner or the master, or to establish that knowledge of such demand, if the

same was made, was conveyed either to the special owner or the Master.

Instead of this, it has presented to this court a record composed of letters and telegrams introduced by itself, and by which it is bound, showing that the firm of L. Rubelli's Sons expressly denied in writing the existence of any general agency between itself and the Oregon-Cailfornia Shipping Company, which letters and telegrams specifically and affirmatively state that the agency existing between L. Rubelli's Sons and the Oregon-California Shipping Company was a limited agency, limiting the authority of L. Rubelli's Sons to the sole task of providing space for cargo on the Steamship "Eureka."

In addition to this, they have introduced the testimony of Mr. Charles Kurz, a witness on behalf of the appellant itself, in which he affirmatively states that the firm of L. Rubelli's Sons was not the general agent of the Oregon-California Shipping Company, and was the agent of the Oregon-California Shipping Company and the Steamship "Eureka" for the purpose only, of providing space for cargo thereon.

Augmenting these letters and these telegrams, introduced by the appellant itself; augmenting their affirmations, which show the absence of any general agency between L. Rubelli's Sons and the Oregon-California Shipping Company; augmenting the testimony of Mr. Charles Kurz, their own witness to the effect that no general agency existed between L. Rubelli's Sons and the Oregon-California Ship-

ping Company; the appellant likewise introduced a telegram, sent by itself to the Oregon-California Shipping Company on October 25th, 1915, more than three weeks following the date upon which it claims to have made a demand for the delivery of its cargo at Colon, in which telegram it demanded that the Oregon-California Shipping Company, the special owner of the "Eureka" tranship its cargo immediately, which demand negatives the contention which it now makes that it desired not to have its cargo transhiped, but desired to have it delivered at the port of Colon.

Furthermore, if on October 1st, 1915, the National Carbon Company did make a demand upon L. Rubelli's Sons for a delivery of its cargo at the port of Colon, which alleged demand constitutes the fundamental basis of this entire controversy, and such demand was made upon the firm of L. Rubelli's Sons by the appellant, acting in the belief that they were the general agents of the Oregon-California Shipping Company, then why on October 25th, 1915, more than three weeks after the first alleged demand, did the National Carbon Company make a lesser demand directly upon the owner, while all the time it believed that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company, and the proper party upon whom to make a demand?

Certainly, the demand for the transhipment made in the telegram of October 25th is a far lesser demand than the demand for a delivery of the cargo

at the port of Colon, because it is not charged that the act of the Oregon-California Shipping Company in transhipping the cargo in question at the expense of the National Carbon Company was any breach of contract, upon which a claim could arise in favor of the National Carbon Company, and, therefore, such demand was a far less important demand then the alleged demand for the delivery of its cargo at the port of Colon.

It necessarily follows that if the National Carbon Company acted under the belief that L. Rubelli's Sons were the general agents of the Oregon-California Shipping Company, and were the proper parties upon whom to make a demand, then it would have made the demand for the transhipment of the cargo, upon the firm of L. Rubelli's Sons, instead of upon the owner.

It likewise follows that if the National Carbon Company had at all times considered that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Company, and the proper party upon whom to make important demands, it would not have made the demand of October 25th, 1915, for a transhipment of its cargo directly upon the owner instead of upon L. Rubelli's Sons.

Furthermore, if on October 1st, 1915, the National Carbon Company had in truth and in fact made any demand whatsoever for the delivery of its cargo at the port of Colon, and, as alleged in its libel, had notified the supposed agents of the perishable

character of the cargo, and of the further fact that if the cargo was not delivered to it on October 1st, 1915, that such cargo would be a total loss, then it certainly would not have been demanding on October 25th, 1915, more than three weeks thereafter, that its cargo, which on its own theory would by that time have become a total loss, be transhipped at its own expense.

In addition to all this, the National Carbon Company, itself, through its Traffic Manager, Anson J. Mitchell, who was its star witness in the present case, did on October 25th, 1915, address a letter to the firm of L. Rubelli's Sons, in which it expressed the hope that Mr. Kurz, who was the general manager of L. Rubelli's Sons, would be given authority by the Oregon-California Shipping Company to handle the transaction as he had outlined or as he saw fit. The language of this letter was as follows:

> "I sincerely hope to hear from you tomorrow in reference to Mr. Kurz having left Philadelphia on his way to Portland, or to the effect that he has been given authority to handle the transaction in the manner he has outlined, or sees fit."
>
> (Libellant's Exhibit 70).

If at all times during the transactions involved in the present controversy, the appellant had considered that the firm of L. Rubelli's Sons was the general agent of the Oregon-California Shipping Com-

pany, and on October 1st, 1915, it further considered that the firm of L. Rubelli's Sons had sufficient authority, as agents of the Oregon-California Shipping Company, to authorize the premature delivery of its cargo to it at the port of Colon in response to its demand, then why on October 25th, 1915, more than three weeks after this alleged demand, did it write a letter expressing the hope that Mr. Kurz, the General Manager of L. Rubelli's Sons, would be given authority from the alleged principal, to handle this transaction in the manner he saw fit, and then introduce this admission in evidence upon the trial of this case?

Corroborating all of this direct testimony introduced by the appellant itself, showing the non-existance of any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, Mr. Anson J. Mitchell, the traffic manager of the appellant himself, admitted that he had at no time been to Colon, and had no definite arrangements, whatsoever, for the transhipment or re-handling of its cargo at the time of the alleged demand for its delivery at the port of Colon.

The above constitutes the affirmative record in this case, which is the appellant's own record disputing the existence of any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, and disputing the present assertion of the appellant that the firm of L. Rubelli's Sons was the proper party upon whom to make so important a demand as the alleged demand for the premature delivery of its cargo at the port of Colon.

Amplifying this affirmative record, we likewise have the record of the appellant itself, which fails to offer proof of any fact showing the exercise of any authority by the firm of L. Rubelli's Sons in the interest of the Oregon-California Shipping Company, analogous in character to the authority required to conform to the alleged demand made at the port of Colon; and under the principles of law above cited, no such general agency can be implied from a record which fails to show that the alleged agent had on prior occasions exercised authority of a character similar to that sought to be implied.

This same record likewise establishes the nature of the authority which was in fact exercised by the firm of L. Rubelli's Sons, and this authority which is shown to have been authority to solicit space for cargo on the Steamship "Eureka" is so vastly different from the authority necessary to conform to a demand for the delivery of cargo, that there is not even the remotest analogy or similarity in the nature of the acts.

To hold in the face of such a record that the appellant in this case would be justified in implying so vast and vital an authority on the part of L. Rubelli's Sons, would be to impose a liability upon the steamship and its owners without any foundation either in fact or in law.

The cases relied upon by counsel for the appellant, in support of the rule that a principal is bound by the apparent authority which he invests in an

agent, thereby inducing third parties to rely thereon, have no applicability to a case where the affirmative record shows the absence of any actual authority in the first instance, much less to a case where the record establishes that the third party itself had full knowledge of the limited scope of the alleged agency.

We, therefore, respectfully submit that the decision of the trial court, finding the absence of any express general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, is in exact accord with the facts of the case as established by the evidence adduced upon the part of the National Carbon Company.

We likewise respectfully submit that the findings of the trial court upon the question of the absence of any facts sufficient to support an implied general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company are likewise amply supported by the record in this case, and further submit that the conclusions of law made by the trial court inevitably follow from such findings.

Turning now from the question of an alleged agency between the firm of L. Rubelli's Sons and the National Carbon Company to the single question of the alleged demand made upon the alleged agents of the National Carbon Company for a delivery of its cargo at the port of Colon, we contend that such a demand, although made upon the principal itself, would be insufficient to support any legal liability against the Steamship "Eureka" for damage to the

cargo in question, and further contend that the alleged demand established by the appellant's own record was, in point of law, an insufficient demand.

The appellant rested its entire claim upon the single case of the "The Martha," reported in Volume 35 of the Federal Reports, page 314. This was a case decided by the United States District Court, for the Eastern District of New York. An effort to trace the history of this case fails to disclose that the same was ever appealed from, modified, or commented upon in any decision of the Appellate Courts.

The case, therefore, stands as a single instance case, and offers no criterion by way of any well recognized or established principle, other than the general principle that the action of a Master, in reference to immediate and extraordinary exigencies which may confront the ship, must be determined in the light of the rule of reason.

Furthermore, the facts involved in the case of "The Martha" are entirely distinguishable from the facts involved in the case at bar.

It appears from a reading of the facts of the case, that "The Martha" was bound from the port of Havre, France, to the port of New York, and was compelled to put into Halifax on account of needed repairs. It further appears that in order to successfully accomplish these repairs, the parts would have had to be obtained from Europe. It further appears, and the court found as a matter of fact, that

in the month of October it became known to all parties, that the repairs would not be completed until February. In view of this situation, one of the consignees made a demand for the delivery of its freight at Halifax, and offered to pay all expenses incident thereto, and to sign an average bond. This demand, the ship owner himself refused, and the court held that such refusal was "without a reasonable excuse", and, therefore, held the ship liable in damages for its action.

It thus appears from a mere reading of the case, that the liability established by the decision in the case of "The Martha" was based on three propositions, to-wit:

FIRST: It was definitely known that the ship would be detained in the port of Halifax from October to February—a period of approximately four months.

SECOND: In view of this situation, the refusal to deliver the goods was without a reasonable excuse.

THIRD: The shipper accompanied his demand with an offer to pay all expenses of discharging the cargo, and in addition to this, tendered an average bond to protect the ship owner against all claims which might arise from other shippers by virtue of disturbing their cargo.

The facts established by the evidence introduced upon the trial of the case at bar are so utterly different from the facts presented to the court in the case of "The Martha", that the only points of analogy between the two cases are—that "The Martha" was a steamship, and that the "Eureka" was a steamship; that each steamship had a cargo; that the voyage of each was interrupted by an unforseen delay, and that the word "demand" appears in each of the cases.

In the case at bar, the steamship "Eureka" set sail from New York with a mixed cargo on board, destined for Pacific Coast ports. The route prescribed by the bills of lading was through the Panama Canal. When the ship reached the Atlantic entrance to the Panama Canal, the master found that he could not continue his voyage on account of a temporary obstruction in the form of slides.

The situation which confronted the master was a serious situation. He found himself in the possession of a ship laden with a valuable cargo, and confronted with one of those exigencies which it is difficult to anticipate. It was likewise one of those exigencies which it is extremely difficult to appreciate.

He was confronted with the possibility that the Canal might open at any time, and in no event could he determine, or even approximate, the possible period of delay.

In the case of "The Martha," upon which the appellant so strongly relies, the period of delay became fixed as soon as it was ascertained that parts

would have to be procured from Europe. In other words, the master of the ship, and the owners of the ship, knew in October that the repairs could not be accomplished until February.

In the case at bar, the delay caused by the temporary obstruction in the Panama Canal, could not even be estimated, and under such circumstances it has been held, that it is the duty of a master to wait until definite information can be obtained. See the case of **Hand v. Baynes, 4 Wharton. 204, 33 Am. Dec. 54, 55, 56, infra.**

The evidence introduced upon the trial of this case by the appellant, shows that every possible effort was made to ascertain from the Government the approximate date of the reopening of the canal.

It appears that on October 4th, the master of the ship wired, to the effect, that he had arrived on September 28th and expected to be able to leave October 10th, although he was unable to ascertain any further information as to the reopening. This appears from libelant's Exhibit 43-A.

On October 8th a letter was addressed to the President of the United States, asking for definite information concerning the reopening of the Canal. This appears from libelant's Exhibit 48.

On October 9th, the Captain of the steamship was informed that steamships of a 30 foot draft would be able to pass through the Canal by November 1st, at least. This appears from Libelant's Exhibit 49.

On October 11th, the master of the ship was advised that the Canal would probably be opened by November 1st, although the obtaining of positive information was at that time almost impossible. This appears from Libelant's Exhibit 53.

On October 11th, a day letter was sent to the Chief of Office of the Panama Canal, requesting information as to its reopening. This appears from Libelant's Exhibit 55.

On October 12th, information was sent out by the Panama Canal office to the effect that the prediction of the approximate date of the reopening of the Panama Canal would be given out as soon as sufficient material was removed to insure stable conditions. This appears from Libelant's Exhibit 56.

On October 11th, a circular letter was sent out by the Panama Canal office to the Chief of the Corps of Engineers to the effect that they were not fully informed as to the date of reopening, but would furnish information as soon as it could be obtained. This appears from Libelant's Exhibits 57 and 57-A.

On October 14th, another circular letter was sent out by the Panama Canal office suggesting the impossibility of giving any definite information regarding the reopening of the Canal. This appears from Libelant's Exhibit 62-A.

On October 13th, a circular letter was sent out by the Engineering Department of the United States Government, stating that the date of reopening the

Canal was still a question of doubt, and that the possibility of ships of 30 foot draft passing through depended on conditions when slides were removed. This is established by Libelant's Exhibit 62-C.

On October 15th, 1915, the master of the ship sent a cablegram, advising that the Canal would probably not open before January 1st, and that the ascertainment of definite information was impossible. This is shown by Libelant's Exhibit 63.

It thus appears that the master waited from the 28th day of September until the 15th day of October, relying upon advices which he constantly received from the United States Government that the slides would probably be removed within a reasonable period of time. These facts all appear from the evidence introduced by the appellant upon the trial of this controversy.

Beginning on the 15th day of October, 1915, when the master finally determined that no definite information concerning the reopening of the Canal could be had, efforts were made on behalf of the steamship "Eureka" to procure a method of transhiping the cargo.

The testimony of Mr. Kurz, one of the witnesses called on behalf of the appellant, was to the effect that after it was ascertained that the probability of the reopening of the Canal was very uncertain, efforts were made on behalf of the Oregon-California Shipping Company to find a method of transhipping

the cargo, and that such efforts continued up until about November 1st, 1915.

The witness further testified that the Government would not permit the unloading of vessels unless definite arrangements had been made for transhipment. The testimony in this particular pointed out the various lines with which the negotiations were taken up, and was in the following language:

"Q. Mr. Kurz, when the slide at the Canal continued after the arrival of the vessel for some little time, it is a fact, is it not, that your firm as well as the Oregon-California Shipping Co. at Portland made a thorough investigation of all possible and practicable methods of dispatching the boat or cargo to the points of destination?

Same objection.

A. Our firm did, I don't know what the people on the Pacific Coast did.

Same motion.

Q. Now, in addition to the disclosures as to those efforts made by your firm, as shown by the exhibits heretofore put in evidence, by the libelant, your firm endeavored to arrange transshipment across the Canal and transportation up the west coast with other carriers, did it not?

A. Yes.

Q. Among others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Steamship Company, the Panama Pacific Line at New York, the owners of the Edison Line at Boston, the Alaska Steamship Company and Olsen & Mahoney?

A. Yes.

MR. WELLES: Objected to, and I move that the question and answer of the witness with respect to what was done for the forwarding of cargo other than libelant's be stricken out on the ground that it is incompetent, irrelevant and immaterial under the issues in this case.

Q. And as to your efforts with all of the transportation companies named in the last question as well as those named in the various exhibits placed in evidence by the libelant, you were unable to arrange for the forwarding of the cargo by rail either across the Isthmus or via the Tehuantepec Railroad because of the lack of carriers on the Pacific Coast to take the goods at the point of discharge on the Pacific side?

A. That is right, up to the time I got to Portland.

BY MR. WELLES:

Q. When did you get to Portland?

A. I arrived at Portland about November 1st.

Q. You were there only four or five days before the vessel came back?

A. Yes.

BY MR. PLATT:

Q. In addition to the efforts to arrange the transshipment of the cargo across the Isthmus and up the west coast, which proved impossible, for the reasons that you have already stated, investigation was made as to the taking of the vessel and cargo to the west coast through the Straits of Magellan, was there not?

A. Yes, sir.

Q. And the same had to be abandoned, is it not a fact, because being an oil burner there was no supply of fuel oil on the east or west coast of South America to make it safe for her to make the trip?

A. That is right.

Q. It is a fact, is it not, that the government would not permit the unloading of vessels de-

tained at the canal either on the west coast or the east coast unless the parties so unloading had definite arrangements made and carriers ready to take the cargoes when so unloaded?

MR. WELLES: Objected to as incompetent, irrelevant and immaterial, consisting merely of hearsay.

A. It is."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, pages 142, 143, 144, 145.)

It thus appears from the evidence introduced by the appellant itself, that from the 15th day of October until the 1st of November, every possible effort was made to find some means for transhipping the cargo of the "Eureka" across the Isthmus of Panama, and that such efforts were futile; and it further appears that the Government prohibited the discharge of cargo at these points unless some definite arrangements had been made for transhipment.

It must be remembered that these statements were made by Mr. Kurz as a witness on behalf of the appellant, and that, therefore, the appellant vouches for the correctness and truth of the assertions.

In spite of all these facts, the appellant now comes forward and asserts that the delay during this period of time, caused by an unavoidable obstruction and an unforeseen contingency, was an unreason-

able delay, and attempts to draw an analogy between the case at bar and the case of "The Martha", where the delay of almost four months was a fact known to the master and to the ship, at the time when she put in to the port of Halifax. It likewise attempts to aggravate the situation by claiming that a demand was made for the delivery of its cargo during this period of time, and that the alleged refusal to deliver was without reasonable excuse, and, therefore, imposed a liability upon the ship.

The alleged demand made for the cargo in question rests upon evidence which is very weak, if not, suspicious.

When Mr. Mitchell, the General Agent of the National Carbon Company, was upon the witness stand, his attention was called to Libelant's Exhibit No. 11, which was a telegram from L. Rubelli's Sons to the National Carbon Company, advising it in response to an inquiry, that the "Eureka" was at the Atlantic entrance to the Panama Canal. This telegram was dated October 2nd, 1915.

After identifying this telegram, and acknowledging the information therein contained, Mr. Mitchell was then asked what was done by him in connection with the shipment in question, to which he replied as follows:

"Q. On receipt of this telegram of October 2nd what did you do, Mr. Mitchell?

A. We did nothing until October 8th, then I

came to New York and interviewed Phelps Brothers & Company.

Q. Who are Phelps Brothers & Company?

A. New York agents of Rubelli's Sons, act as agents for the Oregon-California Shipping Company.

Q. Are they the agents of this vessel?

A. Yes. After leaving New York I went to Philadelphia and interviewed Mr. Kurz, Mr. Davis and Mr. Bates.

Q. Who was Mr. Bates.

A. Mr. Bates, as I understand, is agent representing the Oregon-California Shipping Company at Philadelphia.

Q. How do you understand he is agent?

A. By signatures to the bills of lading, and also by his saying so.

Q. Who is Mr. Davis?

A. Mr. Davis, I understand, is general freight agent and represents Mr. Kurz of Rubelli's Sons, who are acting as agents for the Oregon-California Shipping Company at Philadelphia.

Q. Are these gentlemen all agents of the

S. S. "Eureka" and her charterers, the Oregon-California Shipping Co.?

A. That was my understanding.

Q. How did you get that understanding?

A. From conversations with these gentlemen and also from signatures to the bill of lading offered in evidence.

Q. Did they all tell you they were agents of the company?

A. Yes.

Q. More than once?

A. At various times.

Q. Were they engaged in the business of the ship and its cargo?

A. Yes.

Q. They conducted negotiations with you in respect to that?

A. They did.

Q. Did they have negotiations with you with respect to the forwarding of this cargo?

A. They did.

Q. After there was delay in transmission?

A. Yes, sir.

Q. Now, on or about October 9th, when you saw these gentlemen in Philadelphia, what took place?

A. I explained to them the detail and character of the goods, and at that time we went into the question as to whether or not it would be advisable, or whether we could take the goods out of the ship. They called their foreman upstairs, and he brought up the loading sheet,—I presume they call it that, I don't know the technical name—but the loading sheet showing where the goods which had been received at Philadelphia had been loaded, in what part of the boat, and I asked for the approximate expense to unload these barrels. I was shown where they would have to unload a whole lot of other goods to get to them, and they could not give me an approximate expense, but after thinking the matter over for some time I told them then that rather than have the goods delayed any longer I would go to Colon and take the goods over and also pay all the expense of taking out other goods to get to our goods and get them out, and put the other goods back in the hold, if necessary, in order to have delivery of my goods, as we could not afford to leave them lie there; explained to them the character of the goods and value, and made a demand on them for the goods at that time.

Q. You made a demand for the delivery of the goods at Colon at that time?

A. I did.

Q. What did you explain to them was the nature of these goods?

A. I told them that the nature of a dry battery is that after we ship a battery we are supposed to impress upon our people and all dealers that after 90 days or approximately thereto the life of a cell deteriorates or the cell itself deteriorates, and that we would guarantee our batteries to be as good 90 days from the date of shipment as the date of shipment, and we would stand back of and replace any batteries which went bad in that time. Also told them that heat would affect the batteries to such an extent that they would deteriorate very much faster than if kept in a cool place."

"Q. Were these goods delivered to you, in response to your request made to these agents at Philadelphia, at Colon?

A. No, they were not.

Q. Did they refuse to deliver them?

A. They did.

Q. Why did you want the goods at Colon at that time?

A. In order to save any damage that might happen to the goods and because we needed the goods badly in order to ship our customer's orders.

Q. Did you expect to use them at Colon?

A. Either to transship them to San Francisco or back to New York or Jersey City."

(Testimony of Mr. Anson J. Mitchell, Libelants Exhibit 1, pages 17 to 23 inclusive.)

On cross-examination, however, Mr. Mitchell testified that he was never at Colon, and further testified that he had made no definite arrangements for any transhipment of the cargo at this point. His testimony in this particular was as follows:

"Q. Were you ever at Colon?

A. Never.

Q. Had you made arrangements with any carrier then having a boat at Colon whereby that carrier had contracted with the libelant to handle that portion of the cargo of the S. S. Eureka which was shipped by the National Carbon Company, during any time that the steamship Eureka was detained at the east side of the Panama Canal?

MR. WELLES: Objected to as incompe-

tent, irrelevant and immaterial upon the issues in this action.

A. I had an arrangement with—I won't say an arrangement,—I had talked the matter over with a representative of the Panama Pacific Line, the Panama Steamship Company, the American Hawaiian Company, and also the Luckenbach people, and they told me that there would be no question in their minds but what I could make satisfactory arrangements to have the goods brought back to New York.

Q. What you have stated in reply to the last question, comprised, did it not, all of the arrangements that you had made at any time during the time that the Eureka was detained at Colon, on the east side of the Panama Canal, for the handling of that portion of her cargo which had been shipped by the National Carbon Company?

Same objection.

A. Yes.

Q. Did the National Carbon Company address any direct communications at any time while the Eureka was detained at Colon, at the eastern entrance to the Panama Canal, to the ship or to the captain of the ship, in charge thereof?

A. No."

(Testimony of Mr. Anson J. Mitchell, Libelant's Exhibit 1, pages 185, 186.)

In addition to this testimony of Mr. Mitchell, the libelant offered the testimony of Mr. Kurz, for the purpose of showing a demand for the delivery of the cargo. The testimony was as follows:

"Q. Did he have any discussion with you then relating to these shipments?

A. He did.

Q. At that time did he offer to pay the expenses of unloading this cargo and landing the same at Colon?

A. He did.

Q. Did he call upon you subsequently to that at Philadelphia, about October 23rd?

A. He did.

Q. Did he at that time repeat his offer?

Same objection. Same exception.

A. He did.

Q. Did he offer at that time to pay all costs and expenses of unloading and landing the goods at Colon?

A. He did.

Q. Did he tell you at both of these times that these goods would be greatly damaged if they were not unloaded immediately at Colon?

Same objection and exception.

A. He did."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, pages 138-139.)

On cross-examination, Mr. Kurz further testified as follows:

"Q. As I understood your testimony on your direct examination, at the various interviews had with Mr. Mitchell, Traffic Manager of the National Carbon Company, in Philadelphia in October, 1915, with reference to the disposition of that portion of the cargo of the steamship Eureka in which he was interested, it was in the nature of a discussion as to what was best to be done and what could be done and what should be done with his portion of the cargo, but that there was no demand made upon you for the delivery of this cargo at the Canal Zone?

A. Mr. Mitchell, of the National Carbon Company, came on to Philadelphia and advised me that his goods were perishable and that some arrangement had to be made immediately to get the cargo to its destination or to bring it back to

Philadelphia or New York, and advised me that if we would not make such arrangements that he was ready to take delivery of his goods at Colon, pay for the expense of discharging his goods, as well as such other goods as had to be discharged to get at his goods, and pay for the reloading of the other goods on board."

(Testimony of Mr. Kurz, Libelant's Exhibit 1, page 145.)

The above was all the evidence introduced by the appellant upon the trial of this case to show the making of an alleged demand for the delivery of its cargo at Colon.

It appears from the testimony of Mr. Mitchell that he was never at Colon, and it likewise appears from the testimony of Mr. Mitchell, that he never made any demand upon the master of the ship, or upon the owners, for a delivery of appellant's cargo.

It must further be remembered that Mr. Kurz was a member of the firm of L. Rubelli's Sons, which it is claimed for the purpose of this demand, was the General Agent of the Oregon-California Shipping Company; but there is not a single utterance in this record, and not a scratch of the pen, to show that this demand, alleged to have been made upon Mr. Kurz or the other members of L. Rubelli's Sons, was ever conveyed to the Oregon-California Shipping Company, or the master of the ship.

It further appears from the admitted facts established by the appellant upon the trial of this case, that as late as October 25th, 1915, it made a demand upon the Oregon-California Shipping Company for a transhipment of its cargo.

If the appellant considered it necessary to make a written demand upon the Oregon-California Shipping Company for a transhipment of its cargo, why did it not likewise make the alleged demand for the delivery of its cargo in writing?

The demand for the delivery of this cargo, is now made the basis for this entire litigation, and yet the alleged demand was considered of so little consequence at the time it was made, that there was not a single record of any kind kept or made of such demand, and it is now claimed that the demand was made orally, not upon the master or upon the owner, but upon the agent, who finally appeared as a witness in this case, on behalf of the appellant itself.

Furthermore, on November 3rd, 1915, the National Carbon Company addressed a telegram directly to the Oregon-California Shipping Company, demanding information concerning the batteries on the "Eureka". This demand was introduced in evidence marked 'Libelant's Exhibit 23."

If the appellant considered it necessary to make such a demand upon the principal, and in writing, how can it now explain that it did not deem it necessary to make the demand, which was to become the

basis of this entire action, in writing, and upon the owner?

Again, on November 5th, 1915, the National Carbon Company made a demand upon the Oregon-California Shipping Company and Mr. Chas. Kurz, demanding that it have the option of testing the cargo when the same was discharged from the "Eureka". This demand was introduced in evidence marked "Libelant's Exhibit 27."

The appellant evidently considered that a demand of this character should be made upon the principal, and should be made in writing. Is it logical to suppose that if it actually did make a demand for the delivery of the cargo at Colon, that it would have failed to have made so important a demand upon the owner, and in writing, when it deemed such action necessary as regarded demands of much lesser moment.

We respectfully submit, that the evidence offered in support of this alleged demand, which is made the basis of this entire litigation, is evidence which should be looked upon with great suspicion, when considered in the light of the fact that all other demands were made directly upon the principal, and were made in writing.

It seems to us that this alleged oral demand bears the impress of an afterthought.

As already shown, the master was confronted

with serious difficulties. He sought all possible information regarding the removal of the temporary obstruction in the Panama Canal, which temporary obstruction by no means dissolved the contract of carriage.

When, after a delay of approximately two weeks it was then ascertained that the probability of the removal of the temporary obstruction within a reasonable time was constantly decreasing, the master and the owner then directed their attention to the possibility of transhipping the cargo across the Isthmus of Panama.

These efforts were rendered futile—first, because of the absence of any means of transhipment, and secondly, because of the prohibition of the Government preventing a discharge of cargo without an absolute guaranty of immediate transhipment.

These facts were established by the appellant itself upon the trial of this case.

In other words, the master, acting as the agent of the owner and of all the shippers, exercised the best possible judgment in the interests of all, and after exhausting every reasonable means of completing the contract of carriage by the regular route, he then adopted the remedy provided in the bill of lading, and turned to the nearest reasonable port for a discharge of his cargo, to-wit, the City of New Orleans.

After all of these things had taken place; after

the difficulties had finally been solved; and after the transaction had been closed and the National Carbon Company had accepted its cargo at New Orleans it then comes forward and claims in its brief that the action of the master was not a reasonable action, and that the delay was an unwarranted delay, and attempts to evade the consequences of the very facts which it proved upon the trial of this case, showing the master's diligence and exercise of reasonable care, by asserting that it made a demand for the delivery of its cargo, and that such demand was refused.

If on October 23rd, 1915, the libelant called upon Mr. Kurz and made a demand for the delivery of its cargo at Colon, as it claimed by the testimony set forth on page 139 of the record, then why, on October 25th, 1915, did the same National Carbon Company make a written demand upon the Oregon-California Shipping Company to tranship the cargo, immediately, at the expense of the National Carbon Company.

The absolute inconsistency of this position, as shown by the conflict between the written declarations of the National Carbon Company and the alleged oral demand of the National Carbon Company, establishes that this alleged oral demand was an afterthought for the purpose of bringing the present case within the protection of the decision rendered in the case of "The Martha", 35 Fed. 314.

In the attempt, however, to complete the cycle of

this afterthought, the usual and characteristic omissions, evidenced by afterthought, occurred.

In the case of "The Martha", the libelant made its demand at a place where the cargo could be discharged; in the case of the "Eureka", the appellant made its demand at a place where the Government had prohibited the discharge of cargo, except upon the guaranty of immediate transhipment, and there is no evidence in the record that the steamship "Eureka" was ever in the port of Colon. The only evidence in this particular are the telegrams from the Captain, which were sent from Colon, and there is not a single scintilla of evidence to show that the appellant ever tendered to the steamship "Eureka", its owners, agents, or anyone else, any wharfage facilities, or other facilities, by which it could discharge the cargo of the National Carbon Company.

Furthermore, as has already been shown, the master was the agent of every shipper who had placed any cargo upon the steamship "Eureka."

Whenever a vessel sails from a given port, bound for another destination, each portion of a mixed cargo is deemed to have certain reciprocal obligations with reference to all other shipments of cargo upon the same vessel. In the event of the jettison of any one portion of the cargo to save any other portion of the cargo, the cargo saved must bear its proportion of the expense to the cargo lost.

Whenever, therefore, any portion of an entire

cargo is disturbed, such disturbance amounts to a violation of the obligation which exists between the remaining cargo and the portion which has been disturbed.

The master has no more right to prefer one shipper without cause than he has to prefer another shipper without cause; therefore, in the case of "The Martha", even where it was known that the cargo could not be forwarded for a period of three months, the shipper who made a demand for the delivery of his portion of the cargo tendered to the ship an average bond to indemnify the ship and the owner against any claims which might arise from the other shippers, because of the breaking of the cargo.

In the case at bar, there is not a single piece of evidence of any kind that the National Carbon Company ever offered to indemnify the steamship "Eureka" against any claims which might arise on behalf of the other shippers, in event that the cargo of the National Carbon Company was discharged at the port of Colon.

In addition to all this, the master of the steamship "Eureka" would have had a reasonable excuse to refuse the delivery of the cargo to the National Carbon Company, even if a proper demand had been made upon him for the delivery of the cargo at Colon, for the reason that the continuance of the obstruction which hindered the voyage was a matter of grave and serious doubt, and furthermore because it was the duty of the master, under the provisions

of the bill of lading, to go to the nearest port and tranship all of the cargo at the expense of the shippers.

Under these conditions, and in view of the provisions contained in the bills of lading, which do not appear in the case of "The Martha", the master would have violated his obligation to all the other shippers, had he conformed to any demand which the National Carbon Company might have made upon him for a delivery of the cargo at Colon, to say nothing of his violation of the Government rules, which prohibited the discharge of cargo at that particular time.

In the case of "The Martha", the period of future delay was known to the owners and to the master. In the case of the "Eureka" the temporary obstruction which hampered its voyage was the very uncertainty which has given rise to this litigation.

In the case of "The Martha", the court found that the master had no reasonable excuse for refusing to discharge the cargo. In the case of the "Eureka", the record is replete with reasonable excuses, and we venture to say that no man could have done more for the protection of the interests of all, than did the master of the "Eureka."

In the case of "The Martha", the shipper offered not only to pay the expenses of discharge, but likewise tendered a bond to protect the ship, the owner, and the master against claims which might arise on

behalf of the other shippers. In the case of the "Eureka", there is not the slightest evidence that any such tender was made, and in fact, there is no contention that any such tender was made.

We, therefore, contend that the case of "The Martha", on which the appellant so strongly relies and within the terms of which it has tried to bring itself by the feeble proof of an oral demand, as against all other demands which it made in writing upon the principal itself, is absolutely distinguishable, in every particular, from the facts of the case at bar, because, not only were the circumstances altogether different, but the shipper made an absolute guaranty to protect the master and the boat against the possible claims of all other shippers.

We, therefore, insist that no proper demand has been proven in the case at bar, because it appears from the testimony introduced by the appellant, that L. Rubelli's Sons were not the General Agents of the Oregon-California Shipping Company, and not the proper parties upon whom to make a demand of so vital and important a character.

We insist, in the second place, that the evidence introduced by the appellant for the purpose of establishing this alleged demand is suspicious in character, because all other demands made by the appellant during the period of these negotiations were made in writing, and were made directly upon the Oregon-California Shipping Company.

Furthermore, the evidence offered in support of this alleged demand fails to establish the existence of any wharfage facilities by means of which the demand could have been complied with; fails to show any offer to protect the ship against the reciprocal claims of other shippers; fails to show why the National Carbon Company should have been preferred against the other shippers, and the other evidence introduced by the appellant itself shows that the Government prohibited a discharge of cargo, in the absence of an absolute guaranty of immediate transhipment, and likewise shows that not only was transhipment impossible, but that the National Carbon Company, itself, had made no arrangements for such transhipment.

The appellant rests its entire case upon this alleged demand; therefore, the failure of the appellant to show any demand upon the proper parties, and the failure of the appellant to show the making of any sufficient demand even though made upon the proper parties, required the entrance of the decree in this case dismissing the libel and awarding to the claimant its costs and disbursements.

We, therefore, respectfully submit that the decree of the lower court should be affirmed, not only upon the ground that the record in this case failed to establish any general agency between the firm of L. Rubelli's Sons and the Oregon-California Shipping Company, but upon the further ground, that the same record failed to disclose that any proper or sufficient demand of any kind was made upon those

having charge of the voyage in question, such as would bring the present case within the rule laid down in the case of "The Martha."

Owing to the fact that the appellant has based its entire claim upon the alleged demand, which it asserts was made upon the firm of L. Rubelli's Sons, the insufficiency of such demand, in every particular, necessitates an affirmance of the decree rendered in this case, and the consequent dismissal of this proceeding.

Independently of this fact, however, and regardless of the sufficiency or insufficiency of such demand, the appellee further contends that the Steamship "Eureka" fulfilled its contract of carriage in all respects, and that no liability of any character can be established against the steamship for the alleged damage to the goods of the National Carbon Company.

The appellee asserts that no such liability exists, for the reason that neither the allegations of the libel, nor the evidence offered in support thereof, establishes any breach of the contract of shipment upon the part of the Steamship "Eureka", for the following reasons:

First: The provisions of the bills of lading, under which the goods in question were shipped, exempt the carrier from liability for delay in transportation, arising from causes such as are established by the undisputed evidence of this case.

Secondly: That the reasonable exercise of discretion by the master, under the circumstances established by the appellant's evidence, is binding upon the appellant as well as upon all the other consignees, in whose interest and for whose benefit the master acted, both as a proposition of general maritime law, and as a result of the relation of principal and agent which exists between the master and the consignee under such conditions.

Thirdly: That the appellant has offered no evidence showing that any act of the ship was the direct and proximate cause of the damage alleged.

Fourthly: That there has been no sufficient proof of any damage whatsoever.

Discussing these propositions in their respective order, we direct the Court's attention to the exemptions contained in the bills of lading, under and in accordance with the provisions of which the cargo in question was shipped.

As already stated in the resume of the pleadings, set forth in the statement of facts, the carrier was exempted from liability for loss or damage occasioned "for causes beyond his control or accidents of navigation of whatsoever kind," or "for any loss or damage caused by the prolongation of the voyage," or for damage "while the said property awaits conveyance from any point of transhipment," and was furthermore given authority to tranship the goods, or deliver all or any part thereof, whether at the

terminus of the voyage or not, whenever the ship was prevented from delivery in the regular course of transportation "in consequence of ice, weather, epidemic, quarantine, * * * and all analogous circumstances whatever."

The admitted facts, established by the evidence introduced on behalf of the appellant in this cause, established that the completion of the voyage of the Steamship Eureka was prevented by slides in the Panama Canal, as a consequence of which the United States Government prohibited all ships from going through the canal from about October 1, 1915, to the early part of January, 1916.

This was undoubtedly a cause beyond the control of the carrier and an accident of navigation within the meaning of the exemption clause contained in the bills of lading, and was likewise a cause analogous to ice and weather within the provisions of such exemption clause of the bills of lading.

It is undoubtedly a well established rule of maritime law that all provisions of a bill of lading must be considered in the light of the rule of reason.

It must further be conceded that, in the application of this rule of reason, courts of admiralty not infrequently reject the isolated words of a bill of lading, which are palpably unfair to either party, and enforce the provisions of the bill of lading from the standpoint of the entire contract and the primary purpose and intention of the parties.

It then becomes necessary to review the exemptions contained in the bills of lading, under which the cargo involved in the case at bar was shipped, and ascertain whether or not such exemptions are enforcible exemptions when considered in the light of the rule of reason.

The primary purpose of the parties to the contract, involved in this controversy, was the shipment of certain cargo from the ports of New York and Philadelphia on the eastern coast of the United States, to the ports of San Pedro and San Francisco on the western coast of the United States, through the Panama Canal.

This route, so designated in the bills of lading, was a comparatively new route, when considered from the standpoint of navigation, and in view of this fact, the parties agreed to protect the carrier against unforeseen exigencies which might arise, in the passage to be made through the Panama Canal. In view of this situation, they provided in their bills of lading, as follows:

> "2. No carrier shall be liable for delay, * * * while the said property awaits conveyance from any point of transhipment."

Also

> "3. No carrier, * * * shall be liable for * * * detention or accidental delay."

When the Steamship Eureka arrived at the east-

ern entrance to the Panama Canal, the slides occurred, which prevented her immediate passage through the route designated in the bills of lading. The momentary result of these slides was to impose delay upon the said steamship.

After his arrival at the eastern entrance to the Panama Canal, and after discovering the conditions which confronted him, the master immediately notified the ship's owners, and they in turn notified the consignors of such conditions.

The master sought for information concerning the probability of the length of the delay which would be occasioned by the slides in the canal. He received advices from day to day that the character of the obstruction had not been definitely determined, and that the probable time of its removal was undetermined. He was further advised that the vessel might be able to proceed at most any time.

This action upon the part of the Captain, in delaying for a period of time until he could obtain some more definite information regarding the reopening of the canal, is the first act of delay upon the part of the ship of which the appellant complains.

While the complaint of the appellant in this particular is not specifically set forth in the libel, or any evidence introduced in support thereof, nevertheless, this specific instance of delay constitutes one link in the chain of delays, of which the appellant

complains, as constituting a breach of contract in detaining the alleged perishable cargo involved, for too great a length of time, within the torrid zone.

This action of the Captain comes directly within the exemptions of the bill of lading above set forth, which provide that the carrier shall not be liable for delay while the property awaits conveyance from the point of transhipment, nor for detention or accidental delay.

It must be admitted that detention existed, and it must likewise be admitted that the delay was accidental. The only question which presents itself is whether or not the enforcement of such provisions by the master comes within the rule of reason.

An analogous situation, to that which confronted the master of the Steamship Eureka, occurred a great many years ago in connection with the delay of a ship at the entrance to the Delaware Canal. When the ship arrived at the entrance to the Delaware Canal, it developed that the Canal was temporarily closed for some cause. Upon learning of this fact, the master kept down the Delaware Bay to Morris River, where the boat remained for two days.

Subsequently to that time, the boat went down the bay to the breakwater, and remained for five additional days. After the expiration of this latter period of time, the ship then put to sea, and all the property on board was lost on the following day. The consignor brought an action for certain hides which

had been shipped upon the boat. The shipment was made in accordance with the provisions of the following bill of lading:

Per Sloop Neptune.

"Philadelphia, January 14, 1836.

Received on board Hand's line for Baltimore, via Chesapeake and Delaware Canal, from J. Baynes, one hundred slaughter hides, on deck, which I promise to deliver to Joseph Davenport, at Baltimore, the dangers of the navigation, fire, leakage and breakage excepted, he or they paying freight eight dollars, and porterage one dollar and fifty cents.

H. Hand,

per H. H. Eldridge."

Upon the trial of the case the jury was instructed to find for the plaintiff. The defendant tendered and was allowed a bill of exceptions, and prosecuted a writ of error. The Supreme Court of Pennsylvania, in affirming the decision of the lower court, used the following very significant language, in determining the duty of the master under the conditions which confronted him:

"This is a contract to carry the goods to the place of destination in a prescribed route. This construction of the contract, although not conceded to be correct, has been faintly denied. It

can not be pretended, that if a loss arises in an attempt to convey the goods by sea round Cape Charles, the owners would be liable for the loss unless they could show that the deviation arose from necessity. And yet the carriage by sea would be optional with the carrier, unless the route through the canal is parcel of the contract. There is no mistaking the intention of the parties to the contract. It is well known to shippers, that the navigation is less dangerous by the canal, than by the outward passage. The risk is so much diminished, that it supersedes, in a great measure, the necessity of insurance on the goods, which no prudent person would omit, if he should ship goods in the inclement season of the year, to be conveyed around the coast to the place of destination. And that there was a difference in the risk, was the impression of the owners of the vessel; for the advertisement of the twenty-fifth of March, presupposes the assent of the shippers to the alteration of the route, and the transfer of the goods to a vessel of a different description.

"But it is said, that although the contract was to carry the goods by the way of the Chesapeake and Delaware Canal, yet the deviation from the prescribed route arose from necessity. The evidence does not show with precision, the nature of the obstructions which prevented the passage of the vessel through the canal, but it sufficiently appears, that they were of the ordinary kind, and of a temporary nature. When

the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty was plain; he had one of two courses to pursue; to remain in a place of safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers of the impracticability of proceeding through the canal. The legal effect of the contract, is an engagement to deliver the goods at Baltimore, in a reasonable time; and what would be a reasonable time must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question. If either of these courses had been pursued, and the shipper had brought suit for a breach of the implied contract to deliver the goods in a reasonable time, the condition of the canal at the time, would have entered materially into the question. But notwithstanding this, the case of Hadley v. Clarke, 8 T. R. 259, shows that a temporary obstruction only suspends, but does not dissolve the contract."

Hand v. Baynes, 4 Wharton, 204, 33 Am. Dec. 54, 55, 56.

The bill of lading in the above cited case contains no such provisions as in the case at bar, and, therefore, the rule laid down by the Supreme Court of

Pennsylvania, prescribing the duties of the master when confronted with a temporary obstruction in a canal, becomes of particular importance in determining the reasonableness of the exemptions in the bills of lading in the case at bar as applied to the immediate exigencies, because it establishes by judicial authority the rule of reason to be applied independently of the exemptions of a bill of lading.

The rule prescribed by this decision gives to the master not only the privilege of waiting at the mouth of the canal when the same is temporarily obstructed, but imposes upon him the duty of such act, providing he does not delay longer than a reasonable time, and in accordance with the rule above laid down, the question of what constitutes a reasonable time must be determined from all the circumstances of the case.

The evidence introduced upon the taking of the depositions in the case at bar, discloses that, on September 28th, 1915, the Steamship Eureka arrived at the Atlantic entrance of the Panama Canal (See Libelant's Exhibit 43-A). This exhibit was a telegram from the master of the ship, in which he stated that he did not expect to be able to leave before October 10th, and requested that the owner consult with the officials at Washington for further information as to the opening of the canal.

On October 8th, 1915, within about a week after the arrival of the said steamship at the Atlantic entrance to the Panama Canal, the Quaker Line ad-

dressed a letter to the Honorable Woodrow Wilson, President of the United States, seeking information as to the probable date of the reopening of the canal (See Libelant's Exhibit 48).

On October 9th, 1915, the master of the ship sent a telegram to the agents of the owner that he had received advices to the effect that ships of thirty foot draft would be able to pass through the canal on November 1st (see Libelant's Exhibit 49).

On October 11th, 1915, the master of the ship again sent a telegram advising that he had been informed that the canal would open by November 1st (see Libelant's Exhibit 53).

On October 11th, 1915, the master sent another telegram stating that he had been further advised that the canal would not open by November 1st (see Libelant's Exhibit 54).

It further appears that the Steamship Eureka drew only twenty-one feet of water (see Libelant's Exhibit 55).

On October 12th, 1915, the Government of the United States, through the Panama Canal office, advised the owners of the Eureka that it would be impossible to predict the approximate date of the reopening of the canal, and that the Government did not advise sailing by the Panama route until further notice (see Libelant's Exhibit 56).

On October 8th, 1915, the Government of the

United States issued a letter to the effect that there was no definite prospect of opening the canal until November 1st, 1915 (see Libelant's Exhibit 57-A).

On October 12th, 1915, a memorandum was issued by the Government of the United States advising that the continued movements or sliding material precluded the possibility of fixing any approximate date of the reopening of the canal (see Libelant's Exhibit 62-B).

On October 13th, 1915, the Government of the United States issued another memorandum covering in detail the condition of the canal, raising a doubt as to whether ships of thirty foot draft would be able to pass through within any particular time (see Libelant's Exhibit 62-C).

On October 15th, 1915, the master of the ship was advised that no definite information could be obtained as to the probable date of opening (see Libelant's Exhibit 63).

On November 4th, 1915, the master decided to no longer wait and started for New Orleans (see Libelant's Exhibit 73).

It thus appears from the evidence introduced on behalf of the appellant itself that the steamship arrived at the Atlantic entrance to the Panama Canal on September 28th, 1915.

It further appears that, from September 28th, 1915, until October 15th, 1915, the master and the

owner of the ship were being constantly advised by the United States Government of the probability that a ship of no greater than thirty foot draft (the Eureka being of twenty-one foot draft) might be able to pass through the canal within a reasonably short time.

Relying upon these advices, the master waited from day to day in a safe place at the entrance to the canal, looking for further and definite information as to its ultimate opening. According to the rule laid down in the case of Hands v. Baynes, this was the duty the law imposed upon the master .

It further appears, from the evidence, that the master waited in this condition from the 28th of September until the 15th of October, 1915, expecting each day to receive information that the canal would finally be opened. The condition of the weather, however, as shown by the reports of the United States Government, and the excessively heavy rains, daily increased the difficulties of slides in the canal, and added continually to the uncertainty of the date when the same would be opened.

Under these circumstances, we contend that the action of the master in delaying for this period of time, owing to the uncertainty of the advices which he was receiving, was a reasonable delay, and that the provisions of the bills of lading above set forth, protecting the carrier against damages for detention or accidental delay, when applied to the immediate circumstances of the case at bar, must be construed

as reasonable provisions, and provisions reasonably within the contemplation of the parties.

Beginning on the 15th day of October, 1915, when the master was advised that no definite information could be obtained as to the probable date of the reopening of the Canal, efforts were made by the limited agents of the S. S. "Eureka" to procure a method of transhipping the cargo.

This fact appears from the testimony of Mr. Kurz, one of the witnesses for the appellant set forth upon pages 142-145 of Libelant's Exhibit 1.

According to this testimony, the firm of L. Rubelli's Sons, of which Mr. Kurz was a member, together with the Oregon-California Shipping Company, made a thorough investigation of all possible and practical methods of dispatching the boat or cargo to the points of destination, and made efforts for transhipment across the Panama Canal and up the western coast by other carriers; and interviewed amongst others, the Duluth Steamship Company, the Pacific Mail Steamship Company, the American-Hawaiian Steamship Company, the Atlantic & Pacific Transportation Company, the Luckenbach Company, the Panama Pacific Line of New York and owners of the Edison Line at Boston, the Alaska Steamship Company and Olson & Mahoney.

This evidence likewise shows that all of these efforts were futile, and could not be successfully carried into effect.

It likewise appears that one of the principal reasons why such efforts were futile was that the Government would not permit the unloading of the vessels detained on either the east or west entrance of the Canal unless the parties so unloading had definite arrangements for transhipment.

It likewise appears from Libelant's Exhibit 24 that as late as November 3rd, 1915, efforts were being made to tranship the cargo by the way of the Panama Railroad, and the Nationl Carbon Company was so notified.

Again it appears from Libelant's Exhibit 26 that on November 4th, 1915, the appellant received a telegram from Mr. Kurz to the effect that all possible means were being employed for the disposition of the cargo on the S. S. "Eureka."

It also appears from claimant's Exhibit "C," being a telegram from the Oregon-California Shipping Company to L. Rubelli's Sons, that every effort was being made as early as October 16th, 1915, to make some provision for the disposition of the cargo.

The Oregon-California Shipping Company and L. Rubelli's Sons were in constant communication with the master of the ship during this period of time, and the master, acting upon these advices as to the efforts being made for transhipment, continued his delay at the eastern entrance of the Panama Canal until November 4th, 1915, when it had been finally determined that all efforts of transhipment were futile.

We, therefore, submit that the exemptions above set forth, when interpreted in the light of the circumstances of this particular case, and in the light of the performance of the duty which the law imposes upon a master regardless of the provisions of a bill of lading, and in the light of the discretion which was actually exercised by the master in the case at bar, must be held to be within the rule of reason, and that the carrier must be exempt from any claim for damages alleged to be due to the delay ensuing between September 28th, 1915, and November 4th, 1915. This was the longest period of delay in the torrid zone, and the one of which the libelant most vigorously complains.

After the master became convinced that the slides in the Panama Canal would continue to constitute an impediment to the continuance of his course for an unreasonable length of time, and that all efforts to accomplish a transhipment were futile, he then proceeded to adopt the remedy provided for by the contract between the parties set forth in section eight of the bills of lading. This section provided, amongst other things, as follows:

> "8. When the loading, transport, transhipment or delivery is prevented in consequence of ice, weather, * * * and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled * * * to transship * * * and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all ex-

penses of transshipment or warehousing * * *, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for the account of the shipper, consignee or party claiming the goods."

The literal meaning of the above provision is too plain to admit of argument. The expression "all analogous circumstances whatever" is broad enough to include the slides which took place in the Panama Canal.

The master, therefore, acting in accordance with this provision of the bills of lading, determined, in the exercise of his discretion, that the best and most logical means of procedure was to go to the port of New Orleans, La., and there unload the cargo for transhipment by rail. This was done, and the various consignors accepted the goods at New Orleans for transhipment by rail.

The only question which remains to be determined in this particular, is whether or not this provision of the bills of lading is such a provision as can be enforced without unfair advantage, and one which comes within the rule of reason. A long search of the authorities has failed to disclose any case wherein a provision of this exact language has been construed by the courts.

The case of Pacific Coast Company v. Yukon Independent Transportation Company, 155 Fed. 35, decided in the year 1907 by the Circuit Court of Ap-

peals for the Ninth Circuit, and which is one of the most illuminating and exhaustive opinions on the subject of the rule of reason, as applied in the consideration of bills of lading, discusses the provision contained in a bill of lading somewhat analogous to the above provision in the bills of lading involved in the case at bar.

In that case an agreement was made between the Pacific Coast Company and the Yukon Independent Transportation Company to ship a certain quantity of merchandise, including perishable articles from Seattle, Washington, to the Steamer Monarch at St. Michaels, at the mouth of the Yukon River.

The contract was made after negotiations with the understanding that the goods were intended for early sale in the Yukon River markets, and that the delivery was to be made as soon as the Steamship Senator should arrive at St. Michaels, or as soon as navigation was opened in that harbor.

The shipments were made about the end of May, 1901, and the voyage was the first of the season. It was known by the contracting parties that uncertainty existed as to whether the harbor of St. Michaels would be free from ice on the steamship's arrival, and that usually the harbor was not accessible before the first of July.

The Steamship Senator, on her way to St. Michaels, arrived at Nome on June 16th. After discharging a large portion of her cargo at that port, she proceeded with the remainder, which was the

merchandise consigned to the Monarch, and arrived off Golovin Bay on the morning of June 20th.

Golovin Bay was found to be filled with ice, and after cruising up and down off the face of the ice, and making an attempt to force a passage through it to St. Michaels, the said Steamship Senator, on the morning of the 21st, returned to Nome, and there her master offered to deliver to the consignee the goods at ship's tackle. This offer was declined.

The Steamship Senator then left Nome for Seattle, which port she reached on July 3rd. On July 7th, she started from Seattle on the second voyage, having the original cargo still on board. She went to Nome and thence to St. Michaels, where she discharged the cargo of the Steamer Monarch on July 19th. The ice had left St. Michael's harbor about July 1st, and if the Senator had remained off that port on her first voyage until July 2nd, she could then have entered the harbor and discharged the cargo.

The suit was brought to recover damages for loss on the goods and delay to the steamer Monarch. The amount of recovery was $12,119.75 for loss on the goods and $8,000.00 for delay of the Steamer Monarch. The bill of lading, under which the goods were shipped, provided, amongst other things, as follows:

> "Shipped by .....per Pacific Coast Steamship Co. (hereinafter called carrier), to be forwarded per Steamer Senator, or per some other of the carrier's steamers, * * *

the articles or property enumerated hereon in apparent good order, * * * to be forwarded with as reasonable dispatch as the general business of the carrier will permit, and delivered at vessel's tackle at the port, place or landing of St. Michaels * * * (but with the option to the master to carry the property on deck, to deviate and to lighter, surf, transship, land and reship the said property or any thereof and to stop and land and receive passengers and freight at intermediate ports or place).

"The property shall be received by the consignees thereof at the vessel's tackle * * *; if the consignee is not on hand to receipt the property as discharged, then the carrier may deliver it to the wharfinger, or other party or person believed by said carrier to be responsible, * * * or the same may be kept on board or landed and stored in hulks, or put in lighters by the carrier, at the expense and risk of the owner, shipper or consignee, and at his or their risk of any nature whatever.

"And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provi-

sions of this contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property."

The trial court construed these provisions as inapplicable to the controversy before the court, and held that the steamship company was unable to take advantage of the exemptions, because the act of returning to Seattle, without delivering the cargo or waiting to deliver the cargo at the designated destination, constituted an abandonment of the voyage, and abrogated the contract so that the second voyage constituted an entirely new voyage, and was not governed by the provisions of the original bill of lading.

It was contended, upon appeal, that the trial court erred in its construction of the contract, but the appellate court, in affirming the lower court, applied the rule of reason, and held that, regardless of the language used in the bill of lading, the same must be construed in the light of the situation confronting the parties, and that the act of the master in returning to Seattle, without making further effort to deliver the cargo to the Steamer Monarch, constituted an unreasonable construction of the terms of the bill of lading, and held that the libelant was entitled to recover damages because of the unreasonable action of the master in abandoning the voyage without necessity or reasonable cause. In announcing this rule, however, after a review of the authorities, the court used the following language:

"The bills of lading, while they gave the right to deviate, contain special provision as to the permissible course of the appellants in the event that stress of weather or other cause should prevent the entrance of their vessel into the port of delivery. It provided that, in such a case, the cargo might, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of the contract in regard to the original voyage, and at the risk of the owner, shipper, or consignee. By this provision, the appellants were given the right, under the circumstances disclosed in the evidence, to carry the goods from off St. Michaels Harbor to Nome, and thence to carry them back to St. Michaels or to ship them to that port upon another vessel. They pursued neither course. They offered to deliver the goods to the appellee at Nome, but at ship's tackle, and they declined to assume the expense of lighterage or carriage to St. Michaels. The offer was not a compliance with the obligation of the contract, by the terms of which the appellants were bound to deliver the goods off St. Michaels at their own expense, notwithstanding the provision that the carriage from Nome to St. Michaels was to be at the owner's risk."

Pacific Coast Company v. Yukon Independent Transportation Company, 155 Fed. 29, 34, 35.

The provisions construed by the Circuit Court of Appeals in the above entitled case are very closely analogous to the provisions contained in the case at bar except that, in the case at bar, there exists a stipulation imposing the expense of transhipment upon the consignor or consignee, while in the above case the steamship company was given the privilege of deviation and transhipment without nullifying the contract; providing the expenses of transhipment were paid by the steamship company.

In other words, the Circuit Court of Appeals held that the provision allowing transhipment, in cases where the vessel was prevented by stress of weather or other cause from entering the place of delivery or completing the voyage, was a valid and enforcible provision, and within the rule of reason, but held that the ship had failed to perform its contract because it had neglected to pay the expenses of transshipment.

The only logical inference which can be drawn from the opinion is that, if the bill of lading had provided for the expenses of transhipment, and the master, in the exercise of his discretion, had transhipped the goods at the owner's expense, then such act upon the part of the steamship company would have been a compliance with the obligations of the contract.

The court, in effect, held that the provisions of a bill of lading, allowing transhipment at the expense of the consignor or consignee, in instances where the vessel was unable to complete her voyage, were valid

provisions and within the rule of reason, providing the ship did not take unreasonable advantage of the bargain.

This very principle was pointed out by the United States District Court, for the District of New York, in the case of The Citta Di Messina.

The Messina was an Italian cargo steamer plying between Mediterranean ports and New York. Between August 31st, and September 2nd, 1908, the steamship received a large number of onions consigned to the libelants and others in the State of New York. On September 3rd, she left Denia (the last onion port) and arrived at Almeria on the morning of September 4th. She went there for the purpose of getting twelve thousand barrels of grapes.

The Messina remained in Almeria until the evening of September 16th, 1908, and during that time she received, instead of the large quantity of grapes expected, only six hundred fifty-one barrels.

While the Messina was lying in port, other vessels, thought to be faster, came in and took away whatever grapes were ready for shipment. The boat then left Almeria, and went to the port of Malaga, and after loading made her usual trip across the Atlantic. On arrival in New York, on October 5th, the onion cargo was found to be extensively decayed and the merchantable quality of the rest was much impaired by decaying onions producing stains on the crates and contaminating the sound contents.

The bills of lading under which the shipments were made recited that the Messina was bound for New York, "but with liberty to the steamer either before or after proceeding towards that port to proceed to and stay at any ports or places whatsoever, although in a contrary direction to or out of or beyond the route to the said port of discharge, once or oftener, in any order backwards or forwards, for loading or discharging cargo or passengers or for any purpose whatsoever; and all such ports, places and sailings shall be deemed included within the intended voyage."

It was further agreed in and by the bills that the steamer was not answerable for decay or inherent deterioration, and also that the steamer was not to be responsible for any loss or damage which might arise to fruit or other perishable goods on board, through delay, or loss of time in obtaining and loading other goods to complete the cargo at that or other ports at which she might thereafter call.

There was little ventilation in the hold of the ship at anchor, even though the hatches and ventilators were kept open, and it appeared that under favorable conditions onions, of the kind shipped, would last for three or four months after arrival in the United States.

The evidence established the fact that the weather in Almeria was neither hot nor cold, but the court found that the temperature was higher than was favorable for keeping onions sound.

The libelants alleged that damage to the onions was due to the negligence of the Messina in breaching its contract by remaining in the port of Almeria from the 3rd to the 16th of September, 1908, which it was claimed was entirely unnecessary and constituted a deviation.

District Judge Hough, after reviewing the facts and concluding that the libel must be dismissed, rendered a very able and carefully reasoned opinion, pointing out the distinction between damages arising from deviation as a result of the warranty not to deviate, and damages arising from negligence upon the part of the carrier, such as will remove the goods from the exceptions and exemptions contained in the bill of lading. The opinion is so concise that we present it as an entirety:

> "It is obviously advantageous, if not essential, to libelants' case, to show that the facts found constitute deviation. That 'deviation' is a term of art, belonging in the main to the law of marine insurance, and to be interpreted by that law, seems to me to have been overlooked in argument; and this belief on my part must excuse some review of the subject.
>
> "If an insured shipowner fails to pursue that course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminous to the other, he violates a tacit but universally implied condition of the con-

tract between himself and his underwriter, who is therefore freed from liability for loss subsequent to deviation because the assured has enhanced or varied the risks insured against. 2 Arnould, Mar. Ins. (8th Ed.) Sec. 376; 1 Phil. Ins., Sec. 977.

"If the assured cargo owner have his cargo on a vessel which deviates, he for the same reason may lose (though by no fault of his own) all remedy for subsequent loss against his underwriter, but may proceed against the wrongdoing ship for his damages. It is not, of course, necessary that a cargo owner, in order to recover against his carrier for losses subsequent to deviation, should have himself lost insurance protection by reason thereof. The voyage is the same, whether viewed from the standpoint of insurer or shipper, and any deviation therefrom will cast subsequent loss of or injury to either ship or cargo on the shipowner. The reason also is the same, viz., that the carrier by deviating from a voyage described alike in insurance policy and bill of lading, has broken the warranty not to deviate, thereby terminated his own insurance, and given the shipper a right either to rescind the contract of shipment and treat the goods as converted by the deviator, or to accept the goods, holding the ship responsible for damages subsequent to warrant broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of. Thorley v. Orchis S. S. Co., 1 K. B.

(1907) 660; Thatcher v. McCulloh, Olcott, 365, Fed. Cas. No. 13, 862.

"In effect the deviator loses his own insurance, and becomes the insurer of his cargo from the date of deviation. If, therefore, the Messina was guilty of a deviation, it is wholly immaterial whether her stay at Almeria had or had not any casual connection with the rotton onions found on board in New York. If they were sound when the deviation occurred, the ship must answer for their subsequent damage. That delay, even upon the route prescribed by policy and or bill of lading, may amount to deviation, has been often held (Company of African Merchants v. Ins. Co., L. R. 8 Exch. 154; Coles v. Marine Ins. Co., 3 Wash. C. C. 159, Fed. Cas. No. 2, 988; Audenried v. Mer. Mut. Ins. Co., 60 N. Y., 482, 19 Am. Rep. 204), though the recent British marine insurance act (1916) has excluded delay from the definition of deviation (section 46), while giving the insurer (by section 48) the same release from liability 'from the time when the delay becomes unreasonable.'

"It being, however, still the law of the United States that a deviation (eo nomine) occurs the moment a delay even upon the prescribed route becomes unreasonable, the libelants here insist that the Messina's reasonable stay in Almeria expired in at most four days, yet they have endeavored to show further that her actual stay in the then conditions of weather was injurious

to their onions; a labor quite needless if the delay produced deviation.

"It seems to me that in some cases where shippers have proved that the ship had injured their goods by reason of delay in ports of call, or calls in port unreasonable in respect of cargo already laden, the courts, while rightly awarding damages for breach of contract, i. e., for negligence, have spoken loosely of deviation as if that were the ground of decision. Glyn v. Margetson, A. C. (1893) 351, and cases cited. In Swift v. Furness (D. C.) 87 Fed. 345, the carrier of perishable cargo was authorized by his bill of lading to 'make deviation', and accordingly did so to the injury of his cargo, yet was held responsible. And see The Bordentown (D. C.) 40 Fed. 689, where the doctrine of deviation was invoked to fix liability on a tug which negligently took her tow beyond its destination, thereby exposing it to storm and causing loss. These were not cases of deviation in any proper sense; that word implies a voluntary departure from the usual course of the voyage 'in reference to the terms of a policy of marine insurance' (Hostetter v. Park, 137 U. S. 40, 11 Sup. Ct. 1, 34 L. Ed. 568), and if (for example) the vessels concerned in the Glyn and Swift Cases (supra) had done what they did when insured under voyage policies describing the voyages, as in the bills of lading on which the cases were actually defended, it would have been impossible to contend that a deviation had occurred. So, in this

case, the voyage described in the bills of lading is quite elastic enough to prevent even a longer delay than that in Almeria harbor from producing deviation 'in reference to the terms of a policy of marine insurance' setting forth the same voyage in the same language. C. F. Phillips v. Irving, 7 M. & G. 325; Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664, for striking instances of delay without deviation.

"Libelants cannot, therefore, recover on the ground just considered; and it remains to inquire whether claimants were quilty of negligence, and are therefore deprived of the protection of the exceptions in their bills of lading.

"The question of the burden of proof in actions such as this has been set at rest by The Folmina, 212 U. S. 362, 29 Sup. Ct. 333, 53 L. Ed. —, the nature of the injury shows this damage to be prima facie within the exceptions of the bills, and the burden is on the shipper to establish that the goods are removed from their operation because of the carrier's negligence. The only negligence assigned is delay in Almeria, and what transforms delays permitted by bills of lading, such as those in suit, into negligence, will always depnd upon what voyage was agreed upon in a business sense,—the agreement need not have been for the quickest or most direct mode of transportation. Evans v. Cunard S. S. Co., 18 T. L. R. 374, citing and explaining Glyn v. Margetson, supra. So, in this

case, libelants did not agree for a quick or direct method of conveyance; they did agree that the Messina could do just what she did, provided she did not take unreasonable advantage of the bargain. But that bargain is to be interpreted according to the general usuages of the trade, even though not known to any particular shipper. Hostetter v. Parks, supra; for the facts in Gray (D. C.) 11 Fed. 179.

"It follows, in my judgment, that the libelants must show, in order to recover, that the ship's stay in Almeria was a departure from general usuage, that it was unreasonable in respect of the cargo already laden, and that it was the cause of the damage complained of. The evidence falls short of these requirements. These libelants have made no better case than those in The Hindoustan, 67 Fed. 794, 14 C. C. A. 650, and not nearly so good a one in The St. Quentin (C. C. A.) 162 Fed. 883.

"Libel dismissed, with costs."

The Citta Di Messina, 169 Fed. 472, 474, 477.

As pointed out in the above decision, the shipper must base his claim for damages either on a breach of the warranty not to deviate, where a deviation is the direct cause of damage, or establish negligence upon the part of the carrier as a basis for depriving him of the advantages of exceptions and exemptions contained in the bill of lading.

The libel filed in the case at bar alleges that the owners of the Eureka breached the contract of the shipment by refusing to deliver the cargo to the consigors at Colon, but does not allege that the steamship breached the contract of carriage by diverting the cargo to New Orleans, or by negligently remaining at Colon for too long a period of time.

A liberal construction of the pleadings might allow the admission of evidence to show that the delay at Colon was an unreasonable delay, and, therefore, a deviation, or to show that such delay amounted to negligence sufficient to deprive the carrier of the exemptions contained in the bills of lading. Even admitting of such a liberal construction, however, of the pleadings in this case, no proof could be brought forward which could establish deviation, because, as shown in the case above cited, as well as in the case of Pacific Coast Co. v. Yukon Independent Transportation Co., 155 Fed. 29, 34, a deviation is a voluntary departure, without necessity or cause, from the regular and usual course of the voyage.

In the case at bar, it is admitted that the steamship was precluded from completing the voyage, and it is likewise admitted that the bills of lading protected the carrier against accidental delay or detention, and gave to the carrier the privilege of transhipment in the event of delay from any cause at the expense of the consignor or consignee.

It likewise follows in the case at bar that the admitted cause of the delay from the continuation of

the Eureka's voyage was prima facie within the exceptions and exemptions of the bills of lading, and such fact casts upon the shipper the burden of establishing negligence upon the part of the carrier so as to deprive him of the benefit of the exemptions.

The only negligence claimed in the case at bar was the alleged refusal to deliver the goods at Colon, and the delay at Colon from September 28th, to November 4th, and the diversion to New Orleans.

As already shown, however, the delay at the entrance of the canal was a duty imposed upon the master as an abstract proposition of law in carrying out the reasonable interpretation of the provisions of the bills of lading and the diversion of the cargo to New Orleans, and the transhipment of the same at the expense of the consignee was an act which the bills of lading expressly authorized the master to perform, providing "he did not take unreasonable advantage of the bargain" (169 Fed. 476).

In addition to the above ruling, showing that the provisions of a Bill of Lading allowing a Master to tranship goods at the cost of a shipper is a valid and enforcible provision, providing the Master does not take unreasonable advantage of the bargain, there exists still another rule of maritime law, which provides that, regardless of the stipulations of a Bill of Lading, the Master not only has the privilege of transhipping the goods when the completion of the voyage is prevented by unforseen obstructions, but there is imposed upon him a duty to tranship the

goods under such conditions, owing to his capacity as agent of the shipper.

This rule is laid down in the following decision of the English courts. The case is one of the oldest and best reasoned of the English decisions relating to maritime law.

The case referred to was an action in assumpsit on the part of the ship to recover an amount of increased freight incurred by reason of a transhipment resulting from a necessity arising on account of the perils of the sea and stormy weather. The court in sustaining the ship's claim for this additional freight, laid down the rule establishing the relationship of principal and agent between the master and ship owner. The language of the court in this particular was as follows:

> "One question, however, has been asked, which it will not be right to pass over. What, it has been said, if the transhipment can only be effected at a higher rate than the original rate of freight? Which party is to stand that loss? By the French Ordinance (a) and the Code de Commerce (b), and according to the decisions in America (to which Chancellor Kent refers 3 Com. 212), the ship owner is entitled to charge the cargo with the increased freight, and as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers. * * * * No case of the sort that we are aware of has occurred in this

country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight so as to occasion no farther charge to the freighter; and that, where the freight can not be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant, for it must never be forgotten that the master acts in a double capacity as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owners right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. IN SUCH CASE, the freighter will be bound by the act of his agent, and, of course, be liable for the increased freight. The rule will be the same whether the transhipment be made by the ship owner or the master, and in applying it, circumstances make it necessary, on the one hand, to repose a large

discretion in the master or owner while the same circumstances require that the exercise of that same discretion should be very narrowly watched."

Shipton against Thornton, 9 Adolp & Ellis, 312, 336.

According to the rule laid down in the above decision, it was the duty of the Master of the Steamship "Eureka" to tranship the cargo of the appellant when it was finally ascertained that the slides in the Panama Canal had rendered impossible the completion of the contract of affreightment according to its original terms.

The case goes still further and holds not only that the Master is obligated to perform the duty of transhipment as the agent of the shipper, but likewise holds that the shipper, "will be bound by the act of his agent, and of course, be liable for the increased freight."

It, therefore, follows, that the act of the Master of the Steamship "Eureka" in transhipping the goods of the appellant, when it finally became ascertained that the voyage could not be completed according to the terms of the original contract of carriage, was an act of such Master as the agent of the National Carbon Company, and an act by which the National Carbon Company is bound.

We, therefore, respectfully contend that it was the duty of the Master to remain at the Atlantic entrance to the Panama Canal just so long as there was any probability or hope that the boat might be able to go through..

> "The obligation of the carrier to deliver according to his contract is only suspended during any temporary obstruction. It is not thereby avoided; Angell on Carriers, sec. 289, and cases cited. Hence, plaintiff in error was bound, notwithstanding the hinderance of navigation by low water, to deliver defendant's goods in safety as soon as he could by reasonable diligence after the removal of the unavoidable cause of delay."
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> **Bennett v. Bryam & Co., 38 Miss. 17, 75 Am. Dec. 90, 93.**

We likewise contend that it was the privilege and duty of the Master, when he became convinced that the voyage could not be completed over the prescribed route, to divert the Steamship "Euraka" to New Orleans and from there tranship the cargo of the appellant by rail. Such privilege and duty existed by virtue of the special contract of carriage between the appellant and the Steamship "Eureka", as evidenced by the bills of lading, and likewise existed as a general proposition of law independently of the terms of the bills of lading. Such general rule would be incorporated by operation of law into the bills of lading, regardless of the specific provisions thereof.

It is an admitted fact in the case at bar that the Master of the "Eureka" waited at the Atlantic entrance to the Panama Canal from September 28th, 1915, to November 4th, 1915. It is likewise admitted that the cause of this delay was the existence of slide in the Panama Canal, which prevented the steamship from passing through.

It is likewise admitted that the delay of the Master during that period of time was induced by changing reports issued from time to time by the United States Government to the effect that the reopening of the canal might take place at any time.

It is further admitted that the bills of lading, under which the cargo in question was shipped, provided that the carrier should be protected against detention or accidental delay and against ice, weather or all analogous circumstances whatsoever.

In view of these admitted facts, the duty imposed by law upon the master to remain at the entrance of the canal during the existence of the temporary obstruction, augmented by the exemptions and exceptions in the bills of lading, deprives the appellant of any claim against the Steamship Eureka, upon the theory that her delay constituted a deviation or breach of the warranty against deviation.

In view of these admitted facts, the appellant is likewise deprived of any claim that the ship was deprived of the benefit of the exemptions contained in the bills of lading because of negligent delay, for the reason that such delay by the master at the en-

trance of the Panama Canal was an act in furtherance and in performance of a duty imposed upon such master by maritime law.

In view of these admitted facts, the appellant is likewise deprived of any claim against the steamship upon the theory that the diversion to New Orleans constituted a breach of contract and an abrogation of the provisions of the bills of lading, because such diversion was an act performed by the master as the agent of the consignors and consignees, as well as the agent of the steamship company; and was in accordance with the provisions of the bills of lading allowing such diversion at the expense of the consignors or consignees, providing the ship did not take unreasonable advantage of the bargain.

The evidence introduced upon the trial of this case establishes the fact that there existed no adequate means of discharging the cargo at the City of Colon. No wharfage or other privileges were there provided.

The evidence likewise establishes that the United States Government prohibited the discharge of any cargo at Colon, unless the ship so discharging the cargo furnished the Government with an absolute guarantee of immediate transportation to the western entrance of the Panama Canal, and a further guaranty of immediate transportation from the western entrance of the Panama Canal to the Pacific waters.

The evidence likewise establishes that no such method of transportation was available, although efforts in that regard were made, even by the agents of the National Carbon Company, the appellant in this case.

The court itself will take judicial notice of the fact that the next and most accessible port was that of New Orleans, Louisiana. Under such circumstances, and with such difficulties confronting the master of the Steamship Eureka, it certainly cannot be contended that the master took unreasonable advantage of the privilege allowed him by the bill of lading in diverting the cargo to the City of New Orleans, and charging the consignor and consignees with the expenses incurred in connection with such transhipment.

The appellant is, therefore, deprived of any claim of negligence against the Steamship Eureka, based on any negligence of the steamship growing out of any unreasonable advantage which its master took of the provisions contained in Section 8 of the bills of lading, allowing him to tranship, at the expense of the consignor or consignees, in those instances where the completion of the voyage was rendered impossible by accidental delay, detention, ice, weather and all analagous circumstances whatever.

Turning now to the second sub-division, a question arises as to whether or not the Master exercised a reasonable discretion in dealing with the difficulties which confronted him at the Atlantic entrance to the Panama Canal, and whether or not

such exercise of discretion is binding upon the appellant as well as upon all the other consignees in whose interests and for whose benefit the Master acted.

The master of a ship is the agent of all parties concerned for the purpose of protecting the ship and the cargo when unforseen emergencies arise; he is likewise the agent of the consignor and consignee in so far as the cargo is concerned. The question of whether or not the master takes a reasonable advantage of the privileges given by exemptions contained in a bill of lading is a question to be determined from the facts of each particular case.

As already shown by the authorities above cited, the question of a carrier's liability for damage to goods is determined according to the rules applicable to the relation of shipper and carrier in general, or according to the provisions of the bill of lading under which the goods are shipped.

In either instance, however, the question of liability is measured by the rule of reason.

If no bill of lading exists, then the question to be determined is whether or not the master exercised all reasonable diligence in the protection of the ship and the cargo in view of the conditions which confronted him. If the goods were shipped under a bill of lading, which bill of lading exempted the carrier from liability from any and all causes, then the question to be determined is whether or not the stipulated exemptions, when interpreted in the light of the

rule of reason, properly protected all parties concerned, and this question is determined by the fact of whether or not the master exercised sound judgment and discretion in enforcing the exemptions contained in the bill of lading.

In other words, did the master as the agent of all parties, use proper discretion and exercise a reasonable judgment for the protection of the ship and the cargo in view of the circumstances which confronted him? The rule in this particular has been very elaborately expounded by Mr. Justice Shiras in the following decision of the Supreme Court of the United States:

> "Mr. Justice Shiras delivered the opinion of the Court:
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> The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interests of his employers, the utmost fidelity and attention. Abbott, Shipping, 7th Am. ed. 167.
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> It was well said by the district judge in the present case, that "though exceptions . . . noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the most extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prud-

ence for the interests of all concerned. The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between the ship and cargo when their interests conflict."

"All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned." New England Ins. Co. v. The Sarah Ann, 13 Pet. 400, 10 L. ed. 219; The Amelie, 6 Wall. 27, sub, nom. Fitz v. The Amelie, 18 L. ed. 808.

The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term "discretion" implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means the equitable decision of what is just and proper under the circumstances." Bouvier. Law Dict. "Discretion means the liberty or power of acting without other control than one's own judgment." Webster Dict.

"Courts, in passing upon such questions should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course pursued was

blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible, but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not. Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390.

Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the Styria showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo."

The Steamship Styria v. Morgan, 186 U. S. 1, 46 L. ed. 1027, 1033.

Applying the test above set forth to the questions involved in the case at bar, it becomes necessary to determine whether the Master exercised "a deliberate and considerate judgment" in waiting at the Atlantic entrance to the Panama Canal until such time as he could determine, with a fair degree of accuracy, the improbability of its reopening within a reasonable time thereafter, and after determining such im-

probability, in taking the Steamship "Eureka" to the port of New Orleans and transhipping the cargo at the expense of the shippers.

As already pointed out in the case of Hand vs. Baynes, 4 Wharton. 204, above cited, the law imposed upon the Master the duty of remaining in a place of safety at the Atlantic entrance to the Panama Canal until such time as the obstructions were removed, or until such time as it became probably certain that the obstructions would not be removed so as to enable him to complete the voyage within a reasonable time. Therefore, in exercising his discretion in this particular, he was not only putting into effect "a deliberate and considerate judgment", but was fulfilling a solemn duty imposed upon him by law.

It is an admitted fact in the case at bar, that the slides in the Panama Canal came within the category of "unexpected emergencies". These unexpected emergencies were aggravated by the impossibility of obtaining any information concerning the probable length or shortness of their duration.

As already pointed out in the early part of this brief, the Steamship "Eureka" arrived at the Canal on September 28th, 1915. Immediately thereafter, the Master of the ship sent a telegram, in which he

stated that he did not expect to be able to leave before the 10th of October.

On the 8th of October, 1915, inquiry was made of the President of the United States as to the probable date of reopening the Canal.

On October 9th, 1915, the Master received information that ships of a thirty foot draft would probably be able to pass through the Canal by November 1st, the Master knowing that the "Eureka" was a ship of about twenty-four foot draft.

On October 11th, 1915, the Master was again informed that the Canal would in all probability be opened on November 1st, 1915.

On October 11th, 1915, the Master was again advised that the Canal would probably not open by November 1st, 1915.

On October 12th, 1915, the Government of the United States sent out advices to the effect that it was impossible to predict the possible date of the reopening of the Canal.

On the same date, a memorandum was issued by the United States Government, advising that the continued movements of sliding material precluded the possibility of fixing any date for the reopening of the Canal.

On October 13th, 1915, the Government of the United States issued another memorandum, which raised a doubt as to whether ships of thirty foot draft would be able to pass through within any particular time.

On October 15th, 1915, the Master was again advised that no difinite information could be obtained as to the probable date of reopening.

Beginning on the 15th day of October, 1915, when the Master was advised that no definite information could be obtained as to the probable date of reopening, efforts were immediately undertaken to procure some method of transhipping the cargo across the Isthmus of Panama and up the Pacific Coast. The various steamship companies which were interviewed with reference to the possibility of this undertaking have already been enumerated in detail. These efforts continued until the 4th day of November, 1915, at which time it became apparent that any such efforts at transhipment were futile.

All of these facts appear from the evidence introduced upon the trial of this case by the National Carbon Company itself.

According to the rule laid down in the case of The Steamship Styria vs. Morgan, 186 U. S. 1, above cited, the court "should endeavor to put itself in the position of the actors in the transaction". If this is done, it will immediately become apparent that the Master of the Steamship "Eureka" was confronted

with a condition of affairs which exceeded in perplexity the most severe situation conceivable.

When a Master encounters an obstacle which impedes the progress of his voyage, extreme apprehension must arise in his mind as he stops to consider the great value of the property placed in his care, augmented by the knowledge that his judgment concerning its final disposition is absolute. When, however, a Master encounters obstacles such as the slides which were encountered in the case at bar, aggravated by the never ceasing uncertainty of their removal, a far greater apprehension must of necessity arise in his mind. Especially is this true in the case of a new and unknown waterway, and in an instance where those for whom he is operating are endeavoring to build up a new branch of commercial activity.

It may be that when the action of the Master is viewed from the standpoint of retrospection, that another and better judgment might have been exercised. If the Master knew then, as he knows now, that the peculiar earth formation of the Panama Canal zone would result in an almost unceasing repetition of the slides, he would probably not have remained as long as he did. If the Master had known then, as he does now, that a transhipment across the Isthmus and up the Pacific Coast was an impossible undertaking, he would not have remained as long as he did.

As stated, however, by Mr. Justice Shiras in the

decision last cited—the arbiter should "not be ready to find that the course actually pursued was blameworthy because the results were unfortunate".

It should always be remembered that all human acts must be construed in the light of the rule of reason, and it is always much easier in the final analysis to determine what might have been done than to determine in the first instance what should be done. A very succinct and accurate statement of this principle was announced by the Supreme Court of Ohio in the following very expressive language:

> "There is an ex post facto wisdom, which, after everything has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best light afforded."

American Express Co. vs. Smith, 33 Ohio State 511, 31 Am. Reports, 561.

The above principle was recognized by the Supreme Court of the United States in the very recent case of North German Lloyd vs. Guaranty Turst Company, decided May 7th, 1917.

This was a case wherein the "Kronprinzessin

Cecilie", a German steamship, received some gold in New York to be transported to Plymouth, Eng. and Cherbourgh, France. On July 28th, the steamer set sail for Bremmerhaven, Germany, by the way of Plymouth and Cherbourgh; she continued on her voyage until 11:05 P. M. July 31st, when she turned back, being then in 46 degrees 46 minutes N. Latitude, and 30 degrees 20 minutes W. Longtitude from Greenwich, a distance from Plymouth of 1070 nautical miles.

At that moment the Master knew that war had been declared by Austria against Servia (July 28th); that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange.

The master had proceeded about as far as he could, with coal enough to return if that proved needful, and was of the opinion that the proper course was to turn back. The ship reached Bar Harbor, Me., on August 4th, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31st, the German Emperor declared a state of war, and the directors of the company at Bremen, sent a wireless to the master to the effect

that war had broken out with England, France and Russia, and with directions to return to New York. Thereupon the master turned back.

The probability was that the steamship, if not interferred with or prevented by accident or unfavorable weather, would have reached Plymouth before the final declaration of war. The libellant claimed that the master was not justified in turning back. In denying the libellant's claim in this particular, the Supreme Court, speaking through Mr. Justice Holmes, rendered the following very interesting decision applicable to contracts of affreightment, and the standard by which the judgment of a master should be determined:

> "With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers, or people" other exceptions necessarily are to be implied; at least, unless the phrase "restraint of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like Paradine v. Jane, Aleyn, 26, 82 Eng. Reprint, 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contract would have

demanded or the contractor would have assumed. Baily v. De Crespigny, L. R. 4 Q. B. 180, 185, 38 L. J. Q. B. N. S. 98, 19, L. T. N. S. 681, 17 Week Rep. 494, 15 Eng. Rul. Cas. 799. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. Taylor v. Caldwell, 3 Best & S. 826, 839, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week Rep. 726, 6 Eng. Rul. Cas. 603. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See Mitsui & Co. v. Watts, W. & Co. (1916) 2 K. B. 826, 845, 85 L. J. K. B. N. S. 1721, 115 L. T. N. S. 248 (1916) W. N. 271, 32 Times L. R. 622; The Styria v. Morgan, 186, U. S. 1, 46 L. ed. 1027, 22 Sup. Ct. Rep. 731. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. The Teutonia, L. R. 4 P. C. 171, 8 Moore, P. C. C. N. S. 411, 17 Eng. Reprint, 366, 41 L. J. Prob. N. S. 57, 26 L. T. N. S. 48, 20 Week, Rep. 421; The San Roman L. R. 5 P. C. 301, 307, 42 L. J. Prob. N. S. 46, 21 Week. Rep. 393, 1 Asp. Mar. L. Cas 603. And when we add to the seizure of the vessel the possible detention of the German and some of the other

passengers, the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we can see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. Oliver v. Maryland Ins. Co. 7 Cranch, 487, 493, 3 L.ed. 414, 416; Craig v. United Ins. Co. 6 Johns, 226, 250, 253, 5 Am. Dec. 222. See also British & F. M. Ins. Co. v. Sanday (1916) A. C. 650, 85, L. J. K. B. N. S. 550, 21 Com. Cas. 154, 114, L. T. N. S. 521 (1916) W. N. 44, 32 Times L. R. 266, 60 Sol. Jo. 253.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of the capture, it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German ship owners. The order from the Imperial Marine Office, if not a binding command, at least shows that if the master had remained upon his course one day longer, and had received the message, it would have been his duty as a prudent man to turn back. But if he had waited until then, there would have a question whether his coal would hold out. Moreover if he would have been required to turn back before deliver-

ing, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form, and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of the Styria, supra, although not strictly in point, tends in the directions of the principles that we adopt."

The Kronprinzessin Cecilie, 244 U. S. 12; North German Lloyd vs. Gauranty Trust Co., 61 L. Ed. 960, 965-966.

In the light of the rules announced in this decision, it can hardly be doubted that the Master of the Steamship "Eureka" exercised a sound discretion, and did as a prudent man would have done under all the circumstances of the case.

His waiting at the Atlantic entrance to the Canal until some approximation could be made concerning the duration of the slides was essential to a sound judgment, and was in furtherance of a legal duty.

The efforts to tranship the cargo over the nearest and quickest route across the Isthmus of Panama was in furtherance of a sound judgment, and in performance of the terms and conditions of the bills of lading under which the cargo was shipped.

His final act in going to the port of New Orleans and transhipping the cargo from there by rail, was the last and only alternative left to the Master, and was likewise evidence of a sound judgment, and an act in performance of the terms and provisions of the bills of lading.

It is very easy to assert at this time that the Master might have returned to the port of loading, and discharged the cargo, but the very person who would now make such an assertion would have been the

first to complain if, during the period of return, the Canal had been reopened.

It is very easy to say that the Master might have gone to New Orleans at an earlier date, but the very party who would now make such an assertion would likewise have been the first to complain if the Canal had been reopened while the Master was returning to the port of New Orleans, providing he had not remained a reasonable length of time at the Eastern entrance of the Panama Canal.

It is very easy to say at this time that the Master should not have delayed from October 15th to November 4th, 1915, seeking a method of transhipment across the Isthmus of Panama, but the very person who would now make such a contention would have been the first to complain if the Master had omitted this precaution and the possibility of such a transhipment had developed.

We, therefore, respectfully contend that the action of the Master in seeking information as to the reopening of the Canal, in seeking information as to the various methods of transhipment across the Isthmus, and in finally turning to the port of New Orleans, was an action founded upon an honest and sound judgment, and was likewise an action in furtherance of the exercise of that discretion which he owed to all the shippers of cargo on the Steamship "Eureka", and an action which was in fulfillment of the conditions and covenants of the bills of lading under which the goods were shipped.

We likewise respectfully contend that even if the National Carbon Company had made a proper demand upon the Steamship "Eureka" for a delivery of its cargo at the port of Colon, that the Master would have been fully justified in refusing to conform therewith.

As already pointed out in the decisions above cited, the Master is not only the agent of the Steamship, but is likewise the agent of the owner, the agent of the charterer, the agent of each and every shipper, and the agent of all those having any interest in the voyage. Acting in this capacity, he owes an equal obligation to each and all of these conflicting interests. To conform to the demand of any one person having an interest in the voyage as against all the other interests, would amount to a breach of the legal duty which rests upon the Master.

Under the provisions of the bills of lading covering the shipments in the case at bar, the Master bound himself to tranship the cargo in event that he encountered obstacles which prevented the completion of the voyage. This was a covenant of the written contract under which he took possession of the cargo. It was a covenant, the performance of which he owed to the owner of the steamship, and owed to each and all of the shippers.

Not only did he owe the performance of this covenant as a matter of special contract, but he likewise owed the performance of this covenant as a matter of general law.

It has been held that in instances where difficulties arise which prevent the possibility of completing the contract of carriage on its original terms, that then it becomes the privilege and duty of the Master, as the agent of the shipper to tranship the goods, and that when such act is performed by the Master, he is deemed the agent of the shipper for the purpose of such performance.

This was the rule announced in the case of Shipton v. Thornton, 9, Adolph & Ellis, 312, 336, cited above.

Applying the rule laid down in that case to the facts of the case at bar, we have a situation where the appellant in the present case is seeking to establish a claim against the steamship upon the basis of a demand made upon its own agent, because, under the rule above cited, the Master was agent of the shipper for the purposes of transhipment, or other disposition of the cargo in the event that he encountered unforseen obstructions to the completion of the voyage.

We likewise have an instance where the appellant is seeking to etablish a claim against the steamship for the alleged refusal of its own agent, who was at the same time the agent of all the other shippers, to conform to a demand which preferred the interests of the appellant to the interests of all the other shippers.

This supposed situation proceeds upon the as-

sumed theory that the appellant had actually made a demand upon the steamship instead of upon the unauthorized representatives of the steamship. Even upon this theory, however, it cannot be logically contended that the appellant could hold the steamship liable for the act of its own agent in refusing to discharge the cargo, or the act of its own agent in actually transhipping the cargo.

It appears from the undisputed evidence introduced upon the trial of this case that the cargo of the appellant constituted only a limited portion of the cargo which was consigned on board the Steamship "Eureka". Under the rules of the law above cited, the Master was not only the agent of the appellant, but was likewise the agent of all the other consignors. Acting as such agent for the other shippers, as well as the appellant, the Master was required to do that which would be for the best interests of all.

If a demand had actually been made upon the ship for the delivery of the appellant's cargo at Colon, and the Master had conformed therewith, and during the period of such conformance the Canal had been reopened, then the Master and the ship would have been liable to the other shippers for too long a delay on the prescribed route, and would likewise have been liable to the other shippers for preferring the interests of one to the interests of all, while acting as the agent of all.

Furthermore, if a demand had been actually made upon the steamship or the Master for a de-

livery of the cargo at Colon, and he had conformed therewith before putting out to sea, and a disturbance of the ballast had damaged the cargo of the other shippers, then he would have been liable to the other shippers as the agent of all.

Many other instances might be cited establishing that a conformity to the demand of the appellant would have been a breach of the duty which the Master owed to all the other shippers as well as to the owner of the boat itself.

We, therefore, respectfully contend that even if a proper demand had been made upon the ship and the Master for a delivery of the cargo at the port of Colon, and the Master had conformed therewith, that such action would have been the exercise of a inconsiderate judgment and an abuse of the discretion which was vested in him. It would likewise have been a breach of the duty which he owed to the other shippers, and to the owner of the ship, not only as a matter of contract covenant, but likewise as a matter of general law.

We further contend that the act of the Master in finally transhipping the cargo at the cost of the appellant was an act which was not only in conformity with the conditions and covenants of the bills of lading under which the goods were shipped, but which was likewise in accordance with the duty imposed upon the Master as a matter of general law, and that in accomplishing the task of such transhipment, the Master was acting as the agent of the appellant, and

that, therefore, the appellant is precluded from establishing any liability against the steamship for the acts of its own agent.

A mere reading of the history surrounding this novel voyage should convince a disinterested mind that the Master of the Steamship "Eureka" exhibited a sound judgment and exercised a most exemplary discretion. Those who complain of his acts, complain not of the discretion which he did, in fact, exercise, but complain on the contrary because he did not abuse his discretion in the interest of a single shipper.

If the Master of the Steamship "Martha" had been confronted with the uncertainties which confronted the Master of the "Eureka" it is very doubtful whether the District Court for the District of New York, or any other court, would have held the ship liable for failure to conform to a demand for a delivery of the cargo. It must be remembered that in the case of "The Martha", the delay was fixed and certain. It must likewise be remembered that she was in a port where adequate facilities for discharging existed. It must likewise be remembered that an offer was made to protect her against all future contingencies.

The alleged liability of the steamship in the case at bar should be viewed from the standpoint of all the extraordinary conditions which surrounded the "Eureka" and her cargo, at the Atlantic entrance to the Panama Canal. The new and uncertain condi-

tions which were created by a new and uncertain waterway should be constantly kept in mind.

To hold that the appellant in this case could establish a liability against the steamship upon the basis of the record as presented to this court would be to contravene the long established principle requiring precise and exact proof as a ground work for the implication of an agency to handle the vital interests of another, and allow persons to be charged with the acts of third parties, concerning which they had no knowledge, because the appellant's own witness said:

> "I had no authority other than as booking agent."
>
> (Testimony of Mr. Kurz, Libelant's Exhibit 1, page 151.)

To sustain the contention of the appellant in the case at bar, would be likewise to hold that the solemn provisions of a bill of lading made for the express purpose of protecting a carrier against unforseen contingencies, could be brushed aside at will whenever such contingencies arose.

To sustain the contention of the appellant in the present case, would be likewise to over-throw the long established doctrine of the discretion which necessity has for centuries vested in the Master of a ship.

Conditions such as the closing of the Panama Canal do not often arise, any more than such conditions as confronted the Master in the case of the North German Lloyd vs. Guaranty Trust Company, when the problem of a world war was imminent but unsettled.

The rapid development of physical science, however, and the close union which that science is creating among the nations of the world, invites a continual increase of such channels of commerce as the Panama Canal, and with such development, are bound to ensue serious conditions such as the slides which occurred during the history of the present case, and the only possible way to meet such conditions is to continue the recognition of that powerful responsibility reposed in the Master of a ship through the ages of the maritime law.

Such a recognition of responsibility, carries with it the necessity of a wide discretion to give it full effect, and such discretion when once exercised on the basis of a reasonable judgment, should be protected insofar as it is possible by the courts, which enforce the principles of maritime law.

The recent case of The Kronprinzessin Cecilie (244 U. S. 12), presents the latest and most rigid recognition of a Master's discretion rightly exercised, and goes so far as to say that the threatened impediment need not even have occurred if all the surrounding circumstances were sufficient to satisfy the mind of a reasonable Master that a strong probability of their occurrence was imminent.

As suggested by Mr. Justice Holmes in this decision, while discussing the proper attitude of courts to commercial contracts and commercial enterprises,—

> "business contracts must be construed with business sense."

Turning now to the question of the evidence which has been offered by the appellant for the purpose of establishing its claim for damages, we respectfully insist that no evidence whatsoever has been offered to show that any of the damages claimed were the direct and proximate cause of any act upon the part of the Steamship "Eureka", her Master, or her owners.

> Appellant claims that the total value of the goods at the time of shipment was $10,653.14. Libellant's Exhibit I, page 82.
>
> It is next claimed that the goods were sold for $7831.01. Libellant's Exhibit I, page 82.
>
> It is then claimed that the difference between the price at which the goods were sold and their original value was $2822.13. Libellant's Exhibit I, page 82.
>
> Mr. Mitchell testified on page 82, Libelant's Exhibit I, that this difference was due to the damage occurring on account of the goods being delayed at Colon instead of being turned over to the appellant.

It is next claimed that the appellant paid $401.43 as freight charges from New Orleans to Jersey City, which transhipment was for the purpose of rebuilding the cells. Libellant's Exhibit I, page 83.

It is also claimed that Mr. Mitchell as a representative of the appellant spent $261.81 as expenses in going to New Orleans to supervise the discharge of the cargo at that point.

It is also claimed that the appellant spent $414.40 at New Orleans to put the dry cells in shape to send them back to Jersey City.

It is also claimed that certain incidental expenses were incurred in connection with the discussion as to the transhipment of the goods, such as telegrams, telephones, etc., in the sum of $137.81.

It is then claimed that the difference between the original value of the goods and the price at which the goods were sold added to the expenses enumerated constituted a claim in the sum of $4037.58. Libellant's Exhibit I, page 86.

It is then claimed that owing to the delay at Colon, and the inability of the appellant to procure the dry cells for sale, the market price of the cells dropped in the sum of two cents per cell, making a total of $915.50. Libellant's Exhibit I, page 172.

It is then claimed that on the cells replaced the appellant paid $1312.66 for shipment from Cleveland, Ohio, to California points.

It is then claimed that the total of the market depreciation and the last freight referred to added to the depreciation in the market value amounted to $5718.77.

It is claimed in other words that the delay of the SS. "Eureka" at Colon by virtue of the slides in the Panama Canal damaged the appellant in the following particulars:

First: The appellant had to sell the original cargo for less than it would have otherwise have sold the cargo.

Second: Expenses incurred by way of additional freight, expenses incurred in going to New Orleans, expenses incurred in rebuilding cells at New Orleans, and incidental expenses, all totalling, $1215.45.

Third: The drop in the market price of cells of two cents per cell, totalling, $915.50.

Fourthly: The freight paid from Cleveland, Ohio, to California for replacement of cells, $1312.66.

The recovery of all of the above items is based upon the alleged refusal of the steamship to deliver the goods at Colon, and it is claimed that the delay at Colon produced these alleged damages. This presents a question for determination under the undis-

puted evidence as to whether or not this delay was the direct, efficient, and proximate cause of the loss alleged to have been sustained by the appellant.

The rule applicable to situations of this character was very elaborately discussed by the Circuit Court of the United States for the District of Kansas in the following decision. The case arose out of an action against a railroad company for damages alleged to have been caused by the railroad company on account of unnecessary delay resulting in the injury to cattle by a flood. The facts are summarized in paragraph 4 of the syllabus, and, therefore, we submit the same verbatim:

> "Defendant railroad company had a large shipment of cattle owned by plaintiffs, to be taken over its line and delivered to a connecting carrier at Atchinson, Kan. Owing to floods, it was unable to reach that place with the shipment, and was also notified by the connecting carrier that it could not receive and forward the cattle from there, because of washouts on its line. Neither road had yards in which they could be placed at Atchison and defendant arranged with another company to forward them from Kansas City, and took them there, placing them in the stockyards. These yards had been in large use for many years, and, while the Kaw river, near them, was known to be very high, no flood had ever extended to the yards. However, on the night after the cattle were placed therein an unprecedented rise occurred—many feet

higher than had ever been known before—doing an immense amount of damage to property of all kinds in the valley and flooding the stockyards. To prevent the cattle from drowning, they were driven into overhead viaducts leading from one portion of the yards to another, where they remained for more than a week; a large number dying from starvation, and the remainder being seriously injured."

The court in holding against the claim of the consignor and in favor of the carrier laid down the following very instructive review of the subject of proximate cause and its relation to damage:

"Under the undisputed evidence, what was the direct, efficient and proximate cause of the loss sustained by plaintiffs? The defendant contends, 'the act of God.' The plaintiffs contend, 'the negligence of defendant.' Which contention is correct?

It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury; but, before plaintiffs may recover in these actions, it devolves upon them to trace the loss which they have sustained to the negligence of the defendant, as the direct and proximate cause of the injury.

While the authorities in this country are not in harmony upon this proposition, yet the fed-

eral decisions all agree therein. In Chicago, St. P., M. & O. Railway Company v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582, Judge Sanborn, delivering the opinion, says:

> 'The rule of law which governs this case is not difficult of statement, but, like many other rules, the difficulty is solely in its application. "Causa proxima non remota spectatur." An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been forseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new, independent cause, that could not have been anticipated. Obviously, the relation of causes to their effects differ so widely and are so various that no fixed line can be drawn that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of years.'

"In Railway Company v. Kellogg, 94 U. S.

469, 24 L. Ed. 256, Mr. Justice Strong, speaking for the Supreme Court, said:

> 'It is generally held that in order to warrant a finding that the negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been forseen in the light of the attending circumstances.'

"In Hoag v. Railroad Co., 85 Pa. 293, 27 Am. Rep. 653, it is said:

> 'The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrending circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from the act.'

In the light of these and other authorities, and the undisputed evidence in these cases, have the plaintiffs so alleged and proven?"

Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 135 Federal Rep. 135, 140-141.

Applying the rule laid down in the case last cited

to the facts of the case at bar, the question arises as to whether or not the damage alleged to have been done was the direct and proximate cause of any negligence upon the part of the steamship.

The undisputed evidence shows that the SS "Eureka" was delayed at the entrance to the Panama Canal by virtue of slides, and unable to pass through the Canal in completion of its contemplated voyage.

We respectfully contend that the primary and proximate cause of the delay at the Atlantic entrance of the Panama Canal was the slide and not any negligence or act upon the part of the steamship.

In fact, the only other cause which has been alleged, or attempted to be proved, is the alleged refusal of the steamship company to deliver the goods at Colon. As already shown, however, no demand was made upon the steamship or the master for such delivery, no average bond tendered to protect the steamship against the claims of other shippers, and no provision made for discharging the cargo, assuming a proper demand had been made.

It further appears that the United States Government prohibited the discharge of any cargo at Colon unless a guarantee as to immediate transhipment across the Isthmus and immediate transhipment from there over the waters of the Pacific was given.

In view of these facts, we respectfully submit that none of the damages alleged, or attempted to be proved, in this case can be traced to any act of the ship as the proximate cause thereof.

Turning now to the fourth sub-division set forth above, we contend that there has been no sufficient proof of any damage whatsoever. As already shown by the facts above stated, the bill of lading provided that the carrier should be exempt from liability from:

(Sec. 3, Bill of Lading, Libellant's Exhibit 3.)

> "Insufficiency of package in strength or otherwise, * * * rust, * * * leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay or exposure to weather."

This is a stereotyped form of provision usually contained in bills of lading, and has been many times upheld by the courts. The parties to this controversy contemplated by the bills of lading and the contracts of shipment that the goods were to pass through the Panama Canal. This contemplated that the goods would have to go through the torrid zone. In fact, the evidence of this case establishes that the dry cells were constructed in certain special particulars to meet this very exigency.

Under such circumstances, the carrier will be undoubtedly exempt from damage resulting from heat. This rule was laid down by the Circuit Court of Appeals for the Second Circuit in connection with an action against a ship containing a shipment of shellac from Calcutta to New York made under a bill of lading exempting liability from loss or damage from heat. It was contended that the material was subject to an unusual high degree of heat which caused it to fuse together. The Circuit Court of Appeals in reversing the lower court and dismissing the libel rendered the following decision:

> "Lacombe, Circuit Judge. The bill of lading contains an exception of 'loss or damage * * * from * * * heat or fire on board, in hulk or craft, or on shore.' The District Court found that the injury to the shellac was undoubtedly caused by heat, and the evidence abundantly sustains that conclusion. Therefore the burden of establishing some negligence of the carrier rested upon the libelants, because, the injury having resulted from an excepted cause, the carrier was not responsible unless his own negligence was affirmatively shown. Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; The Patria, 132 Fed. 972, 68 C. C. A. 397.
>
> We are unable to concur with the District Court in the conclusion that such negligence is to be inferred from the fact that the condition of the shellac on the ship's arrival showed that

it must have been subjected to an very unsually high degree of heat. That it was, and would in the nature of things, be subjected to a very high degree of heat on the voyage, especially through the Red Sea, is shown by the proof. That a very large part of it fused and ran together, although stowed in a particularly well-ventilated part of the ship, might indicate either, as the district judge inferred, that the ventilating apparatus was not properly employed or that this particular lot of shellac was of a grade peculiarly susceptible to heat, and thus fusible at a temperature lower than that to which it would be exposed with all proper attention to hatches and ventilators. Under the rule laid down in the cases cited we cannot find that there was negligence of the ship, which would deprive it of the benefit of the exception as to loss or damage from heat.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the libel, with costs."

The St. Quentin, 162 Fed. 883, 884.

Mr. Anson J. Mitchell, the Traffic Manager of the appellant, testified as follows:

"Q. Did the marks indicate anything as to the quality of the goods at the time they were

shipped from your factory as to whether they were first class or not?

A. Well, not the marks, except that we knew from the marks that they were special cells made under special instructions, which cover long distance cells.

Q. Then the marks indicated that these cells were long distance cells, is that right?
A. Yes."

(Testimony of Anson J. Mitchell, Libelant's

Exhibit 1, pages 55-56.)

Mr. Edwin J. Wilson, Manager of the Eastern Works of the National Carbon Company, testified, amongst other things, as follows:

"Q. When these goods left your factory were they of a class that was suitable for shipping for export or for California ports?

A. No.

Q. For what reason?

A. We did not consider them good enough for shipment to those points. In fact, we made it a point not to ship any, not even to southern points where the climate is warm.

Q. Does it require a specially high grade of batteries for export to California points?

A. Yes. It does."

(Testimony of Edwin J. Wilson, Libelant's Exhibit 1, page 100.)

Mr. William A. Richey, a chemist in the eastern works of the National Carbon Company, testified, amongst other things, as follows:

"Q. You have examined shipments of cells that have come through the tropics, and through locations similar to the Canal zone, have you not?

A. I have seen cells that have been through the tropics.

Q. Did such cells, under ordinary conditions of carriage, show signs of deterioration by heat?

A. They did not. We make our cells to stand the ordinary conditions of transportation through the tropics. The seal is made at a melting point high enough so that it will stand tropical temperature, or wherever we ship that particular cell."

(Testimony of William A. Richey, Libelant's Exhibit 1, pages 115-116.)

As already shown by the reference above set forth to an excerpt from the bills of lading, the steamship was protected from liability from damage arising from "heat". Therefore, in the language of the case last cited, the burden of establishing some negligence on the part of the "Eureka" rested upon the appellant because the injury resulted from an excepted cause.

As shown by the testimony above set forth, it was contemplated by the appellant that the goods in question would pass through the tropics, and would be subject to a very high degree of heat. For this reason, the cells were made purposely to meet this exigency. The burden, therefore, according to the ruling of Circuit Judge Lacombe, rested upon the appellant to show that there was some negligence on the part of the ship which would deprive it of the benefit of the exceptions as to loss or damage from heat.

The only evidence appearing in the record in this case is the conclusion of the various witnesess produced by the appellant to the effect, that in their opinion the condition in which they found the cells at New Orleans must have been caused by excessive heat. This was the testimony of Mr. Anson J. Mitchell, the appellant's own Traffic Manager. The testimony was as follows:

"Q. From the conditions you saw, what did you conclude was the cause of the damage?

A. I concluded they had stayed in the hold of the ship where it was too hot.

Q. What else happened, anything?

A. Practically that is all, and the delay of course, naturally being old cells, not strictly fresh cells."

(Testimony of Anson J. Mitchell, Libelant's Exhibit 1, pages 57 and 58.)

Mr. William A. Richey testified as follows:

"Q. Could you judge in this case what was the cause of the excessive internal action?

A. My opinion of the matter is that the action was caused by a long period of exposure to rather excessive heat. That is what the indication showed on examination of the cells."

(Testimony of William A. Richey, Libelant's Exhibit 1, page 113.)

Mr. Richey likewise testified as follows:

"A. We found on removing the cells that the

greater part of the cells showed straw marks that is, marks as to the impression made by the straw on the seals, which is only caused by the seal softening under the influence of heat."

(Testimony of William A. Richey, Libelant's Exhibit 1, page 109.)

It thus appears that all the damage claimed by the appellant to the cargo in question was, on its own theory, caused by heat, which was one of the exceptions contained in the bills of lading, and under said exception the carrier was protected from damage to goods on account of heat.

The only evidence offered to show any negligence upon the part of the Steamship which would deprive it of the right to claim this exemption is the testimony offered to show that the ship delayed too long a time at the Atlantic entrance to the Panama Canal.

As already set forth, however, we respectfully contend that this very delay was caused by an unavoidable contingency, for which the carrier was not responsible, and the period of delay was reduced to a minimum by the exercise of reasonable discretion on the part of the Master.

In view of the fact that the appellant knew the cargo was going through the tropics, we contend that the case at bar comes directly within the ruling

laid down in the case of the St. Quentin, 162 Fed. 883, 884, above set forth.

It must always be remembered that the appellant in this case has never at any time claimed or offered any evidence to show that the goods in question were improperly stowed. Therefore, there is no basis upon which the appellant can claim that the steamship was guilty of such negligence as to preclude it from claiming the benefit of the exceptions of the bills of lading exempting it from damage to cargo caused by heat.

The appellant has failed to establish the making of any proper demand on the Steamship "Eureka" for the delivery of the cargo at the port of Colon. Therefore, the decree of the lower court should be affirmed.

The appellant has failed to show that the Master abused his discretion in dealing with the situation out of which the present controversy arose, and, therefore, it should be held that the Master exercised a reasonable discretion, and such discretion should be supported by a decree in favor of the steamship.

The appellant has failed to establish that any act of the ship was the proximate cause of the damage which it alleges was done to its cargo. Its claim in this particular must, therefore, fail.

The only proof offered by the appellant to show any damage whatsoever, is proof that the cargo was damaged by heat. Against such a claim, the steam-

ship was protected by the provisions of the bills of lading, and no evidence has been offered to show that the steamship was guilty of any negligence which would preclude it from claiming the benefit of this exception in the bills of lading.

Very respectfully submitted,

PLATT & PLATT,

HUGH MONTGOMERY,

FARRELL, KANE & STRATTON,

Proctors for Appellee.